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The principle question suggested by the case of Albany Perforated Wrapping Paper Co. v. John Hoberg Co., recently decided by the United States Circuit Court of Wisconsin, is whether the manufacturer of a single article has the right to use and to be protected in the use of more than one trade-mark for that article. There seems to be little authority upon the subject. The court in that case came to the conclusion that he cannot, that a trade-mark must denote origin, and its legitimate purpose is to distinguish the goods of the manufacturer using it from those of other manufacturers. They accordingly held, applying the doctrine to the facts of that case, that a manufacturer of a single article, like toilet paper, who uses upon his packages a large number of different names to designate difference in quality, shape or size, or merely to meet the whims of customers, and which tend to produce confusion, rather than certainty, as to origin, cannot be protected in the exclusive use of such names as trade-marks. A trade-mark is defined to be the name, symbol, figure, letter, form or device adopted and used by a manufacturer or merchant in order to designate the goods he manufactures or sells, and distinguish them from those manufactured or sold by another, to the end that they be known in the market as his, and thus enable him to secure such profits as result from a reputation for superior skill, industry or enterprise. "How," the court asks in the case mentioned, "can that purpose be accomplished if a manufacturer, dealing in a single article, used a thousand different trade-marks to designate the article and its origin? Such use necessarily produces confusion and fails of the single purpose of the trade-mark—to designate with certainty the origin of the product. Certainly no manufacturer would, in regard of self-interest, indulge in such a practice, for he would thereby defeat the very purpose he sought to accomplish. This consideration has led me to the conviction that the complainant, the originator of perforated rolled toilet paper, would not do that which would blind the public mind to the originator and manufacturer of the article and would tend to dissipate its trade. It is more probable (and the evidence, I think, sustains the conclusion), that its design was, by the various names, to distinguish between the size, shape and quality of the paper manufactured, and that the marks were not placed thereon as indicating origin. The only authority which I have been able to find passing directly upon this question is the case of Candee v. Deere, 54 Ill. 439, 457. In the conclusion reached by the Supreme Court of Illinois upon this particular question I fully concur. It is remarkable that, with respect to so simple a product as that in question, it should be found that so large a number of claimed trade-marks should be used by one manufacturer. A court of equity cannot be impressed by an appeal to protect that which produces infinite confusion. It may be that in the struggle for trade the whims of retailers must be consulted, and that rivalry between dealers to present something attractive to the public eye must exist; but courts of equity do not sit to indulge the whims of purchasers, or to protect one in creating confusion. They sit to protect and to enforce legal and equitable rights. If this bill can be maintained, the extent of the proprietorship of the complainant in the use of arbitrary names applied to the subject of toilet paper would be limited only by the imagination of its officers."

A question regarding the legal *status* of osteopathy, and physicians practicing it, came before the Court of Appeals of Kentucky in Nelson v. State Board of Health. The substance of the conclusion of the court in that case was that a college which teaches osteopathy, a method of treating diseases by kneading or manipulation of the body, and does not teach surgery, bacteriology, *materia medica*, or therapeutics, is not a "medical college," within the meaning of a statute of that State, which requires the State board of health to issue a certificate to practice medicine to any reputable physician who has a diploma from a reputable medical college chartered under the laws of this State, or from a reputable and legally chartered medical college of some other State or country, indorsed as such by the State board of health;

and that one who practices osteopathy, not using medicine or surgical appliances, does not practice medicine, within a statute which declares that "authority to practice medicine" shall be a certificate from the State board of health, though another statute provides that "to open an office for such purpose, or to announce to the public in any way a readiness to treat the sick or afflicted, shall be deemed to engage in the practice of medicine within the meaning of this act," as the act of which these sections form a part, when considered as a whole, shows that the legislature only intended to regulate the practice of medicine by physicians and surgeons; and, therefore, a certificate from the State board of health is not necessary to authorize one to practice osteopathy; and that the State board of health will be enjoined from interfering with or molesting one in the practice of his profession as an osteopath. This decision is in line with the authorities on the subject. A statute precisely similar was passed in the State of New York. In Smith v. Lane, 24 Hun, 632, a person treating disease like the one involved in the Kentucky case was charged with violating the act. The court held him not within the statute. A similar statute was enacted in Ohio, and in State v. Liffring, 55 N. E. Rep. 168, the question was presented whether an osteopath was included in the statute. It was held that he was not. A similar ruling was made in Rhode Island. State v. Mylod, 40 Atl. Rep. 753.

NOTES OF IMPORTANT DECISIONS.

ELECTRIC WIRES—NEGLIGENCE.—In Brush Electric Light & Power Co. v. Lefevre, 67 S. W. Rep. 640, decided by the Supreme Court of Texas, it appeared that two exposed electric light wires were stretched across a street, about sixteen feet above the pavement and about two feet over the top of a wooden awning, containing no railings, and not used as a place of resort. A person went upon such awning to raise the wires so that he could pass thereunder a house he was moving, and while there lost his footing, and, to steady himself, grasped the wires, and was killed. It was held that as the top of the awning was not a place where people could be expected to resort, and the wires were not improperly placed with respect to the surface of the street, no negligence could be imputed to the lighting company, and a verdict against it therefor should be set aside. The court said in part:

"There can be no liability for the injury in this case unless, from all the circumstances, the electric light company could reasonably expect that some person might be injured by its failure to cover the wires placed by it upon the awning where the deceased received his injury. Railway Co. v. Bigham, 90 Tex. 225, 38 S. W. Rep. 162. In the case cited, Chief Justice Gaines, on behalf of the court, expressed the rule in the following language, quoting from the Supreme Court of the United States in the case of Railroad Co. v. Kellogg, 94 U. S. 469, 24 L. Ed. 256: 'But it is generally held that, in order to warrant a finding that negligence, or an act not amounting to wanton wrong, is the proximate cause of an injury, it must appear that the injury was the natural and probable consequence of the negligence or wrongful act, and that it ought to have been foreseen in the light of the attending circumstances.' This is probably as accurate a statement of the doctrine as can be given, and is substantially that generally laid down by the authorities. Applying this rule to the facts of this case, the inquiry arises: Would an ordinarily prudent man, looking at the surroundings as they then appeared, have reasonably expected that any person would be upon the awning and might be injured by coming in contact with the exposed wires? If such a consequence might have been reasonably foreseen, then the plaintiff in error would be liable for the injury, under the facts of this case, unless there be some other defense. If not, then it cannot be held liable for the death of Paul Lefevre. If the testimony is such that a jury might have found that the electric light company ought to have anticipated the injury, then this court cannot inquire into the correctness of such a conclusion, although it might differ with the jury as to the correctness of the verdict. In the facts of this case there is not a scintilla of proof that the awning had been used by any person as a place of resort, either for pleasure or for business. Looking at the photographic views of the situation, the awning appears to be such as is common in the towns and cities as a protection to the front of the building, with no railing or other protection upon the top or roof showing the intention for persons to resort there for any purpose whatever. If a man of ordinary prudence had been placing the wires at the same points, the facts would not have notified him that probably some one would be injured by them. From the street and the sidewalk to the place where the exposed wires were located is a distance of about sixteen feet, which must have been at least ten feet above the heads of men of ordinary height passing along the street, and there were no means by which passers upon the street or sidewalk could come in contact with the wire. It was, therefore, not negligence, with regard to persons traveling along the street or sidewalk, to leave the wire exposed, because there was no

reasonable, and scarcely a possible, chance for such persons to be injured thereby. We are of opinion that there is no evidence upon which a jury could base a verdict in favor of the defendants in error, and the trial court erred in refusing to give the requested instruction to find for defendant."

CHECKS—FORGED INDORSEMENT—LIABILITY.—In Land Title & Trust Co. v. Northwestern Nat. Bank, 46 Atl. Rep. 420, decided by the Supreme Court of Pennsylvania, it appeared that A, falsely representing himself as B, who was the owner of certain land, obtained a loan on a mortgage executed by him in B's name on the land, the lender giving him a check therefor drawn to the order of B. He indorsed it, in the name of B, to defendant, and the latter indorsed it and obtained the money thereof of the bank on which it was drawn. It was held that, it having been given to the person intended, the drawer had no claim against the bank, and therefore the bank had no claim against defendant. The court said in part:

"Generally a bank is not bound to know the signature of the indorser of a check, and, if it pays a check on a forged indorsement, it can recover the money of the party to whom it was paid, if it proceeds promptly on discovery of the fraud. This is upon the principle that the indorsement of a check is an implied warranty of the genuineness of the previous indorsements. But, in order that a bank may recover, it must appear that it has sustained a loss. If it can charge the payment to the account of the depositor, it has lost nothing and has no cause of action. The question is then the same, whether we consider the check as having been drawn by an ordinary depositor in the trust company, or as having been drawn, as it was, by the real estate department of the company, on the banking department. While, as between the bank and the trust company, a banker, the former is bound by its implied warranty of the indorsement, still there is no cause of action unless the payment of the check was not, as against the drawer of the check, a good payment. The reason of the rule that when a bank pays a depositor's check on a forged indorsement, or a raised check, it is held to have paid it out of its own funds, and cannot charge the payment to the depositor's account, is that there is an implied agreement by the bank with its depositor that it will not disburse the money standing to his credit, except on his order. The rule applies where a check has been lost or stolen and the payee's name has afterwards been forged; but it does not protect a depositor who is in fault, as in intrusting a check to one whom he has reason to suppose will make a fraudulent use of it, or in so carelessly filling up a check that it may readily be altered, or in issuing a check to a fictitious person. It is confined to cases in which the depositor has done nothing to increase the risk of the bank. It should not apply when the check is issued to one whom the drawer intends to designate as the payee: First. Because in such a case the risk is not the ordinary risk assumed by the bank in its implied contract with its depositor, but a largely increased risk, as it follows that a check thus fraudulently obtained will be fraudulently used. The bank is deprived of the protection afforded by the fact that a *bona fide* holder of a check will exercise care to preserve it from loss or theft, which are the ordinary risks. There is thrown upon the bank the risk of antecedent fraud practiced upon the drawer of the check, of which it has neither knowledge nor means of knowledge. Secondly. Because in such a case the intention with which the drawer issued the check has been carried out. The person has been paid to whom he intended payment should be made. There has been no mistake of fact, except the mistake which he made when he issued the check, and the loss is due, not to the bank's error in failing to carry out his intention, but primarily to his own error, into which he was led by the deception previously practiced upon him.

"It is somewhat surprising that the question presented by this case has not arisen more frequently. There are but few decisions upon it, and none in this State. But the views which we have expressed are in entire harmony with the principles which we have recognized as governing the decision of cases arising from the forgery of notes and checks, and involving kindred questions. Among the more recent of these is Iron City Bank v. Ft. Pitt Nat. Bank, 159 Pa. St. 47, 28 Atl. Rep. 197, in which the cases are reviewed by our Brother Mitchell, and it is said by him: 'It is always a good defense that the loss complained of is the result of the complainant's own fault or neglect, and it would require a statute in very explicit terms to do away with so universal a principle of law, founded on so incontestable a principle of justice.' In Bank v. Vagliano (1891), App. Cas. 107, the bank had been induced to pay by notice from Vagliano Bros. of the drawing and acceptance of the draft, and, as the case differs from this in that important particular, it cannot be cited as a precedent. But the opinions of the lords are instructive on the questions involved in this case, and the principles announced by them would settle the contention in favor of the defendant. Lord Selborne said: 'It is not, as I understand, disputed that there might, as between banker and customer, be circumstances which would be an answer to the *prima facie* case that the authority was only to pay to the order of the person named as payee upon the bill, and the banker can only charge the customer with payments made pursuant to that authority. Negligence on the customer's part might be one of those circumstances. The fact that there was no real payee might be another.' There are, however, decisions in other States which are directly in point. In Bank v. Shotwell, 35 Kan. 360, 11 Atl. Rep. 141, the facts are almost identical with those in this case. An unknown person, who represented himself to be

Guernesy, who was the owner of a quarter section of land, obtained from Shotwell a loan secured by mortgage on Guernesy's land, and received from Shotwell in payment a draft drawn to the order of Guernesy. He indorsed Guernesy's name on the draft, and sold it to the bank. In an action by Shotwell to recover of the bank the amount received by it on the draft it was held that, although Shotwell was deceived in the transaction, the person with whom he dealt was the person intended by him as the payee of the draft, designated by the name he assumed in obtaining the loan, and that his indorsement was the indorsement of the payee named. It is said in the opinion: 'The vital point in this case is that Shotwell intended the draft to be sent to the party executing the notes and mortgage, and intended it to be paid to the person to whom he sent it, and whom he designated by the name of Daniel Guernesy, because that was the name he assumed in executing the notes and mortgage; and, therefore, the national bank is protected in paying the draft to the very person whom Shotwell intended to designate by the name of Daniel Guernesy.' In Maloney v. Clark, 6 Kan. 82, the plaintiff was induced to send a draft drawn to the order of his brother to a stranger, who in the correspondence had personated his brother. The stranger indorsed the name of the plaintiff's brother on the draft and sold it to the defendants, who were bankers. It was held that under these facts the plaintiff could not recover. In Robertson v. Coleman, 141 Mass. 231, 4 N. E. Rep. 619, a person who assumed the name of Barney took to Coleman, an auctioneer, a stolen horse and buggy to be sold. Before selling them Coleman made inquiry, and received a favorable report of the standing of the real owner of the assumed name. After the sale he gave a check, drawn to the order of Barney, to the person for whom he sold the team, who indorsed it and parted with it for value. Payment of the check having been stopped, suit was brought by the holder against Coleman, and a recovery had. In the opinion it was said: 'It is clear from the facts that, although the defendants may have been mistaken in the sort of man the person they dealt with was, this person was intended by them as the payee of the check, designated by the name he was called in the transaction, and his indorsement of it was the indorsement of the payee of the check by that name.' It would follow, under this reasoning, that if the check had been paid by the bank it would have been a good payment. In the case of U. S. v. National Exch. Bank, 45 Fed. Rep. 163, decided by the Circuit Court of the United States for the Eastern District of Wisconsin, it was held that a bank was not liable for the payment of a check on a forged indorsement where the person who committed the forgery and received the money was in fact the person to whom the drawer delivered the check, and whom he believed to be the payee named. Shuman had, by fraud, obtained possession of a post office money order drawn in favor of Erben, on which he forged Erben's indorsement, and in payment of the order received a check from the postmaster, drawn on the bank defendant, to the order of Erben, on which he forged Erben's indorsement, and it was paid by the bank. This decision, as the others cited, is put upon the ground that the intention of the drawer of the check was that it should be paid to the person to whom he delivered it. There are a number of other cases which more or less directly recognize the principle on which these decisions are based, but in which there is no direct ruling on the subject, and we have found none which express a contrary view."

WHAT CONSTITUTES AN ASSIGNMENT OR TRANSFER.

The question, What constitutes an assignment or transfer? seems at first sight easy enough to answer. The meaning of these terms is, in a broad, general way, sufficiently well understood. Yet when we come to seek legal precision in defining that species of transfer called an assignment, we find many difficulties because of the various senses in which the term is used. Thus it has one meaning when applied to personal property, and another when applied to real property; one meaning when applied to tangible property, and another when applied to things in action and involving third persons in the transaction; and still further, within this realm of incorporeal personal property, one sense when applied to commercial paper, and another when applied to other kinds of things in action. Then, again, apart from these differences due to the nature of the subject-matter to which the term "assignment" is applied, there is the special sense in which the term is sometimes used as covering the instrument of transfer rather than the transfer itself. It is the object of the present article to explain, in a measure, these various significations to an extent not believed to have been hitherto attempted. The distinctions thus sought to be brought out will, it is trusted, be found to be of more than mere theoretical importance, as presenting peculiarities of vital interest in regard to important phases of the law of transfer.

Broadest Sense of Term "Assignment."—In the broadest sense of the term "assign-

ment," it may be said to cover a transfer of any kind of interest whatever. Recognition to this comprehensive scope of the term is given in the statement, made in language tinged with antique phraseology,[1] that assignment is the setting over or transferring the interest a man hath in anything to another.[2] A more elaborate characterization describes the idea of an assignment as essentially that of a transfer, by one existing party to another existing party of some species of property or valuable interest.[3] This statement[4] emphasizes the need of an "existing" party to show that an assignment can in no just sense be made by a dead man. This, if it were true, is a matter pertaining to the requisites rather than the definition of an assignment. The word "transfer" itself implies a transaction between parties, so the reference to the parties seems altogether unnecessary. Nor is it material to the idea of an assignment that the interest be valuable. It might turn out to be valueless, and yet be none the less the subject of transfer. But what then is the vital idea of an assignment, as we understand the term to-day? It is that of a transfer of an interest in property rather than of the property itself. The interest consists of some species of property or any portion thereof. But the term assignment involves the conception that it is that incorporeal thing, the interest, which passes over to another, and not that corporeal thing the property. A person's interest may happen to constitute the whole property, but this coincidence in fact does not prevent a difference in the conception. The distinction is not, however, borne in mind in various common law and other characterizations of the term "assignment."[5] As the term "transfer" implies, there must be a parting with the interest on the one side, and an acquisition of it on the other, unless the transfer is ineffective.[6] Perhaps it may also be said to be characteristic of the term "assignment," in its broadest sense, that it often covers interests of an uncertain or contingent character, and frequently transfers a variety of interests, such as the entire property rights of a debtor, or the complete assets of a business establishment, including every sort of claims or demands.

Restricted Sense as Applied to Real Property.—In a more restricted sense than its comprehensive scope is just explained, the term "assignment" is used as at common law, to signify a transfer of some particular estate or interest in land or real property in general.[7] Still more narrowly and technically, the term is confined to a transfer of an estate for life or for years,[8] and is usually applied to the transfer of the latter kind of estate,[9] and distinguished from a lease, as the difference has been put in accredited quarters, as being a transfer of the whole property without the reservation of any reversionary interest.[10] In a more modern signification, however, or at any rate, in a less restricted one, the term assignment is generally appropriated to the transfer of chattels, either real or personal, or of equitable inter-

[1] Quoted from Jacob's Law Dictionary.

[2] This is the statement made in Hutchings v. Low, 1 Green or 13 N. J. Law, 246, at p. 246, and in Edison v. Frazier, 4 Eng. or Ark. 219, at p. 220. A somewhat similar idea is manifest in the definition adopted from Wood's Inst. 281, that an assignment is the appointing and setting over a right to another, by Pennington, J., in Garretsie v. Van Ness (1806), 2 N. J. Eq. or 1 Penning 20, at p. 30, or 2 Am. Dec. 333, at p. 339.

[3] This is the characterization made in Hight v. Sackett, 34 N. Y. 447, at p. 451, and quoted in Andrews v. Nat. Bank (1876), 7 Hun, or 14 N. Y. Sup. 20, at p. 22.

[4] Based on 1 Tomlin's Law Dict. tit. "Assigns."

[5] See for example Ball v. Chadwick, 46 Ill. 28, at p. 31; 1 Bouv. Law Dict. (15th Ed.) 194; Schee v. La Grange (1889) 78 Iowa, 101, at p. 105, or 42 N. W. Rep. 616, at p. 618. Compare a species of combination of the two ideas in Hight v. Sackett, 34 N. Y. 447, at p. 451; Seventh Nat. Bank v. Shanandoah Iron Co. (1887), 35 Fed. Rep. 436, at p. 440; Griffing v. New York Central Ins. Co. (1885), 100 N. Y. 417, at p. 422, or 3 N. E. Rep. 309, at p. 311, or 53 Am. Rep. 202, at p. 204; Harlowe v. Hudgins (1892), 84 Tex. 107, at p. 111, or 19 S. W. Rep. 364, at p. 365.

[6] Such is the idea essentially conveyed, though in phraseology open to criticism in various particulars, in Potter v. Holland, 4 Blatchf. (U. S.) 206, at p. 210, and Banning v. Sibley, 3 Minn. 389, at pp. 395 396.

[7] See for a like description, Harlowe v. Hudgins (1892), 84 Tex. 107, at p. 111, or 19 S. W. Rep. 364, at p. 365. This follows Black's Law Dict. 98.

[8] 2 Blackst. Comm. 326. See Scott's Execx. v. Scott, 18 Gratt. (Va.) 150, at pp. 159 60. Compare the more general statement in Banning v. Sibley, 3 Minn. 389, at p. 396.

[9] See the quotation from Bouvier's Institutes in Ball v. Chadwick, 46 Ill. 28, at p. 31.

[10] Blackst. Comm. 326, quoted in Bridge Proprs. v. State, 21 N. J. Law, or 1 Zabr. 384, at p. 389. See further concurring opinion of Freedman, J., in Constantine v. Wake, 1 Sweeny (N. Y.), 239, at pp. 246 47. Concerning an assignment of the lease itself, see Potts v. Delaware Water Power Co., 1 Stockt. Ch., or 9 N. J. Eq. 592, at p. 618.

ests;[11] while, as has been indicated at the outset, in the broadest and latest sense the term covers a transfer of any kind of interest in any kind of property, real or personal, legal or equitable.

Restricted Sense as Applied to Things in Actions and Involving Third Persons.—Again, the term "assignment" is used at common law, as relating more particularly to choses in action, to denote the transferring and setting over to another of some right, title or interest in things, in which a third person, not a party to the assignment, has a concern and interest.[12] This technical signification is sometimes utilized to cover the meaning of the term in a statute, where the third persons concerned are creditors.[13] The interpretation of the statute thus reached, making the word "assignment," as there used, involve the idea of third persons, is doubtless correct enough. Yet the basis for the construction given hardly seems broad enough, when it asserts this to be inherent in the general meaning of the term "assignment."[14] Nor should sight be lost of the fact that it is merely the exigencies of the particular matter under consideration which causes courts sometimes, while attempting to exclude certain rights from the range of assignability, to make statements[15] which would seem to restrict assignments altogether to choses in action as distinguished from choses in possession. Such a view would confound a frequent use of the term "assignment" with its necessary signification.

Restricted Sense as Applied to Commercial Paper.—Another use of the term "assignment" in a restricted sense applies to a transfer of commercial paper by delivery.[16] It has been considered, however, by an American judge,[17] that this is scarcely a correct use of the term, although such use has grown up under the usages of commerce. The objection made is that assignment is strictly a transfer in writing, as distinguished from one by delivery.[18] But it is quite customary to speak of an oral as well as a written assignment; and it is not perceived that this is an inaccurate use of terms. The restrictions imposed by the statute of frauds may have made written assignments more common, and the desire to put transactions in writing for purposes of preservation of a record of the matter may have increased the vogue of this form of assignments; but oral assignments are certainly not even unenforceable, much less invalid, in all cases. It is quite usual, in fact, to use the term "assignment," in its relation to commercial paper, in a broad, general sense, as denoting any kind of transfer, whether by indorsement, delivery, or otherwise.[19] It has sometimes been judicially said, however, that such a meaning belongs to technical law language, and would not be accepted by the layman.[20] In regard to non-negotiable paper, there can strictly be, according to what seems the better view, no such thing as an indorsement, but merely an assignment of such paper.[21] Yet we find various jurisdictions in which a different view prevails. Sometimes the distinction has been taken that as to non-negotiable bonds and

[11] See the quotation from Watkins on Conveyancing in Banning v. Sibley, 3 Minn. 389, at p. 396.

[12] This definition is adopted from 1 Bac. Abr. 329, or 1 Bouvier's Am. Ed. 379, in Cowles v. Ricketts, 1 Iowa, or 1 Clarke, 582, at p. 582, and Chase v. Walters, 28 Iowa, 460, at p. 464.

[13] See the cases just cited.

[14] It is true that the term is often and most usually applied to transfers of incorporeal property like a claim in which interests of third parties are concerned. But it is none the less true that in a broad sense, the term equally applies to transfers of corporeal property with which third persons have no special concern.

[15] Like that in Cross v. Sacramento Savings Bank (1885), 66 Cal. 462, per McKee, J., for the court, at p. 466.

[16] Enloe v. Reike, 56 Ala. 500, at p. 504; Taylor v Reese, 44 Miss. 89, at p. 92.

[17] Stone, J., in Enloe v. Reike, as just cited.

[18] This view is sustained by the statement made in 1 Bouv. L. Dict. tit. Assignment (15 Ed.), 194, and is measureably upheld by the decision in Andrews v. Carr, 26 Miss. 577, at p. 578.

[19] See Bump v. Van Orsdale, 11 Barb. (N. Y.) 634, at pp. 637 38; Jaque v. Alleyn, 16 Barb. (N. Y.) 580, at pp. 582 83. An allegation of assignment has been held to include delivery in Hoag v. Mendenhall (1872), 19 Minn. 335, at pp. 336 37.

[20] Potter v. Bushnell, 10 How. Prac. (N. Y.) 94, at pp. 95 96. An indorser of a negotiable note has been held not for an "assignor of a thing in action," in a statutory or Code sense, in Hicks v. Wirth, 4 E. D. Smith (N. Y.), 78, at pp. 79 83; Potter v. Potter, 18 N. Y. 52, at pp. 53 56.

[21] See the exposition of this matter in Iron Works v. Paddock, 37 Kan. 510, at pp. 513-14, quoted in De Hass v. Roberts, 59 Fed. Rep. 853, at p. 857. Also Townsend v. Carpenter (1841), 11 Ohio, 21, at p. 22.

notes the legal title to them passes by assignment only, and that "assignment" in such a connection means more than "indorsement," as covering indorsement by one party, with intent to assign, and an acceptance of that assignment by the other party.[22] The subject belongs more peculiarly, however, to the domain of the law of commercial instruments. Therefore, without here pursuing the matter further, it may be sufficient to rest upon the statement of the law made by the leading authority on that topic.[23] His statement is to the effect that the term "assignment" is usually employed to denote the transfer of bonds and notes not negotiable, and also the transfer, without indorsement, of instruments which are negotiable; and that despite what is said by the courts in various cases, it is correct to speak of assignment by delivery of instruments payable to bearer.

Assignment as Denoting the Instrument of Transfer.—The limits of the present article will not permit more than mention of the use of the term "assignment" to denote the instrument of transfer, rather the act of transfer itself. Such use necessarily implies, of course, that the transfer is in writing, which need not invariably be the case. This use of the term is often made in statutes relating to assignments for the benefit of creditors.

Scope of Term "Transfer."—Nor is it possible here to dwell on the meaning of the term "transfer." It can merely be said that the term is broader than assignment in not being confined to property; that as applied to property it is sometimes confined in its application to personal property and contrasted with a "conveyance" of real property, though it is broad enough to cover any kind of property; and that while an assignment contemplates especially a transfer of an interest, a transfer may particularly be either, on the one hand, of the title, or, on the other hand, of the possession.

NATHAN NEWMARK.

San Francisco, Cal.

[22] Bank of Marietta v. Pindall, 2 Rand. (Va.) 465, at pp. 475 76, discussed in Welsh v. Ebensole, 75 Va. 651, at pp. 657 58, in connection with Freeman's Bank v. Ruckman, 10 Gratt. (Va.) 126, at pp. 128 32.

[23] 1 Daniel, Neg. Inst. (4th Ed.) § 729.

INJUNCTION—PROTECTING EASEMENT.

IVES v. EDISON.

Supreme Court of Michigan, June 5, 1900.

Where, by a deed conveying to complainant a store in a block, there was granted to her an easement in a flight of stairs leading to the second story, at the point at which the stairs were then located, and she refused permission to change the location of the same, and commenced suit to enjoin the change before it was commenced, she is entitled to an injunction, though, after the bill was dismissed, defendants, without waiting for the appeal, made the change, so that the restoration of the stairs will cost them more than a jury might consider it worth to complainant.

Hooker and Long, JJ., dissenting.

MOORE, J.: Prior to May, 1886, there was a four-story brick block, known as the "McReynolds Block," at the cornor of Lyon and Canal streets, in the city of Grand Rapids. The block had a frontage of about 80 feet on Canal street, and 90 feet on Lyon street. The north half of the block is now owned by the Richmond estate. The south half was then owned by Edison & Telford. In the center of the block, leading from Canal street, there was a stairway about 5 1-2 feet wide, reaching to the second story of the block. This stairway was one-half on the south half, and one-half on the north half, of the block. The only access to the upper three stories of the block from Canal street was up this stairway. On the second story of the block was a rotunda reaching across the entire width of the two center stores. Immediately in front of the stairway from Canal street, but at the further side of the rotunda, was a stairway leading to the third story of the building. A gallery running all around the rotunda enabled one to reach the rooms surrounding the rotunda in the third story. A flight of stairs on each side of the second stairway reached from the third to the fourth floor of the building, where there was a similar gallery to the one in the story below. The rotunda was lighted from the roof. In May, 1886, Calvin L. Ives bought the south store in this block, subject to a mortgage of $6,000, for the sum of $16,000, and a deed was executed and delivered to him on the 10th day of that month. The deed, in addition to conveying the south 19 feet and 9 inches of the block, contained the following provisions: "Granting and conveying, also, for the consideration aforesaid, unto the party of the second part, his heirs, executors, administrators, and assigns, the further right and privilege, in case said block shall ever be destroyed by fire, of building, on the premises immediately north of the premises hereby conveyed, a stairway, both in front and rear, suitable for the building or buildings to be erected or rebuilt on the premises hereby conveyed, and next immediately north thereof, the center line of which said front and rear stairway (or cases) shall be exactly over and upon the north line of the premises hereby conveyed, which front and

rear stairway shall be built and perpetually maintained at the mutual and proportional expense of the party of the second part hereto, and George M. Edison, his heirs, executors, administrators, and assigns; hereby conveying an easement to the said party of the second part hereto in the premises north of the premises hereby conveyed, for the purpose above stated, and reserving to the said George M. Edison, his heirs, executors, administrators, and assigns, a like easement and privilege in the premises hereby conveyed, upon a like contingency. Also, hereby quitclaiming to the party of the second part hereto, for all laudable and legitimate purposes, the free, perpetual, and uninterrupted use, for himself, family, friends, customers, and lessees, of the stairs and stairways now leading into the block of buildings known as the 'McReynolds Block,' in the said city of Grand Rapids, both front and rear, and all other stairs and stairways accessible from what is called the 'rotunda' in said building or block, with a like perpetual use for a passageway, and for light of said so-called 'rotunda' aforesaid, and the passageways thereto and therefrom, except such passageways as lead to the private apartments in said building or block, as belong to the parties owning the premises north of the premises conveyed in this deed. Also, hereby conveying the privilege and right to hang, place, and suspend signs, pictures, etc., at the foot of said two flights of stairs hereinbefore mentioned, —said right to hang and place pictures, signs, etc., to be used in such a manner as not to interfere with or obstruct the travel up and down said stairs,—with a like right and privilege to suspend signs and pictures in the south half of said rotunda aforesaid in said building or block. Reserving to George M. Edison, his heirs, executors, administrators, and assigns, the right of use in common of the front entrance to the basement of said block, so that he, his lessees, his heirs, executors, and administrators, shall and may have a right of access to pass to and from the basement of the store next north of the premises hereby conveyed, and known as 'No. 20 Canal street.'" After this deed was delivered, Mr. Ives took possession of the property; renting the first story as a store, and the upper rooms for offices and for other purposes. When this bill was filed, August 30, 1899, the one-fourth of the block next north of Mr. Ives was owned by the defendant Edison. The defendant May was a tenant of the Richmond estate, and occupied the north half of the first story as a double store. He also rented the store owned by Mr. Edison. He desired to take out the partition wall between this store and the double store then occupied by him, making one large room of the three stores, and to take out the center stairway, so that he would have but one entrance and a continuous front. He got the consent of Mr. Edison to remove the stairway from the center of the block, Mr. May proposing to put one somewhat narrower, just adjoining the party wall between Mr. Ives and Mr. Edison; the whole of it to be upon the property owned by Mr. Edison. He sought the consent of Mr. Ives, but the latter refused to give it. Mr. Ives learned that Mr. May proposed to remove the stairway after he had refused his consent to its removal, and filed this bill on the 30th of August, 1899, to prevent his tearing out the center stairway. After it was filed, Mr. Ives died, and Mrs. Ives is now his representative in the proceeding. December 30, 1899, after a hearing, the bill was dismissed, with costs against complainant. An appeal was promptly taken by complainant.

After the decree was entered in the court below, the defendant treated the case as though it was finally adjudicated in his favor, and, as appears from affidavits filed with the briefs, has torn out the center stairway entirely and has put in the stairway as already indicated. The proof taken before the circuit judge was contradictory as to whether the proposed change would seriously injure the complainant or not. It is urged here that, while the defendant may not have had the legal right to do what he has done, the change is a beneficial one to the complainant, and, in any event, has not done her such an irreparable injury as to entitle her to the aid of a court of chancery, and her relief, if any, is in a court at law; citing Woods v. Early, 95 Va. 307, 28 S. E. Rep. 374; Johnston v. Hyde, 32 N. J. Eq. 453; McBryde v. Sayre, 86 Ala. 458, 5 South. Rep 791, 3 L. R. A. 861; Trustees v. Thacher, 87 N. Y. Rep. 311; Starkie v. Richmond, 155 Mass. 188, 29 N. E. Rep. 770. We do not place the same interpretation as do the solicitors for the defendant upon the case of Woods v. Early, 95 Va. 307, 28 S. E. Rep. 374. In that case an injunction was granted by the court. In the opinion the following language was used: "Mr. Justice Story says: 'Where easements or servitudes are annexed by grant or covenant, or otherwise, to private estates, the due enjoyment of them will be protected against encroachments, by injunction.' 2. Story, Eq. Jur. § 927. It was said by Judge Burks in Sanderlin v. Baxter, 76 Va. 305: 'Damages in repeated suits would not compensate in such a case. The injury is irreparable, and calls for a preventive remedy, such as a court of equity only can furnish. That court constantly interposes by injunction where the injury is of that character. By the term "irreparable injury" it is not meant that there must be no physical possibility of repairing the injury. All that is meant is that the injury would be a grievous one, or at least [a material one, and not adequately reparable in damages.' See, also, Kerr, Inj. p. 199, ch. 15, § 1; Manchester Cotton Mills v. Town of Manchester, 25 Gratt. 825, 828; Switzer v. McCulloch, 76 Va. 777; Anderson v. Harvey's Heirs, 10 Gratt. 386, 398; Rakes v. Manufacturing Co. (Va.), 22 S. E. Rep. 498, 499." In Johnston v. Hyde, 32 N. J. Eq. 446, cited by the counsel, the court granted an injunction, and stated: "Mr. Johnston declares himself willing

to put down through his grounds a culvert of such dimensions as the court shall direct. But without the consent of Mr. Hyde, and in the absence of any estoppel by acquiescence, the court cannot compel him to accept the substitution of a covered aqueduct for an open raceway." In the notes to this case is a collection of authorities holding that the easement cannot be changed without the consent of both the parties interested, even though the change would be beneficial, and in nearly all of the cases relief by injunction was granted. Merritt v. Parker, 1 N. J. Law, 460; Tillotson v. Smith, 32 N. H. 90; Hulme v. Shreve, 4 N. J. Eq. 116; Dewey v. Bellows, 9 N. H. 282; Dickenson v. Canal Co., 15 Beav. 260. In McBryde v. Sayre, 86 Ala. 458, 5 South. Rep. 791, 3 L. R. A. 861, it was made to appear that complainants had changed the use of the easement very materially from what it was when granted, and that the change was harmful to the dominant estate. The court, under the circumstances, declined to grant the writ of injunction, and left the parties to their remedy at law. In the case of Starkie v. Richmond, 155 Mass. 188, 29 N. E. Rep. 770, the plaintiff did not move, after learning of the proposed trespass upon the passageway, until it was consummated by the erection of an expensive building. The court, under such circumstances, declined to interfere, but intimated pretty clearly that, if plaintiff had applied seasonably, the court would have compelled the moving of the building.

Counsel say the proposition is universally recognized that an injunction will be issued, in the discretion of the court, only when there is threatened an irreparable injury, or a continuing trespass or injury which cannot be compensated by damages in a suit at law, "and, in the exercise of this discretion, the court will examine into all the circumstances of the case, and if it is apparent that the relief sought is disproportionate to the nature and extent of the injury sustained, or likely to be," or "if the injunction will cost the defendant many times more loss than the complainant will suffer, the court will not interfere;" citing Hall v. Rood, 40 Mich. 46; Potter v. Railway Co., 83 Mich. 297, 47 N.W. Rep. 217, 10 L. R. A. 176; Bentley v. Root, 19 R. I. 205, 32 Atl. Rep. 918; Wood v. Sutcliffe, 2 Sim. (N. S.) 163; Chapin v. Brown, 15 R. I. 579, 10 Atl. Rep. 639; Varney v. Pope, 60 Mo. 192; Welton v. Martin, 7 Mo. 307; McElroy v. Goble, 6 Ohio St. 187; 2 Beach, Med. Eq. Jur. § 713, and other cases. An examination of these cases will show that each of them differs in some essential particular from the case at bar. In some of them the easement was not a private one created by deed. In others the injured party, after knowledge of the proposed trespass, remained inactive, and allowed a large expenditure of money to be made before invoking the aid of the court. In each of them it was made to appear that it would be inequitable for the equity court to interfere. But what are the facts in this case? Mr. Ives bought a valuable piece of property, and, as a part of the purchase, he obtained an easement that he and his grantor regarded as essential for him to possess. In the same deed which conveyed to him the title in fee to the store, there was granted to him the easement. The deed was promptly recorded, thus giving notice to the world of what his rights were. He entered upon the use of the easement, and continued to use it for nearly 13 years. The defendant Edison joined in the deed to Mr. Ives, and received part of the consideration paid therefor. The defendant May knew what the rights of Mr. Ives were. He sought to obtain his consent to a relinquishment of his easement. Failing to obtain this, with the consent of Mr. Edison he determined to take away the easement of Mr. Ives, and substitute another in the place of it. Learning of his disposition to do this, the complainant invoked the aid of the court. While the case was awaiting a final determination, the defendant saw fit to ignore the rights of the complainant, and to ignore the legal proceedings, and proceeded to remove the stairway and to substitute another in the place of it. To accomplish this wrong has cost the defendant a large sum of money. To restore the easement thus arbitrarily taken will cost another large sum of money, the aggregate of which sums is so large that it is now said it will be entirely disproportionate to the injury done the complainant, and for that reason the court should not grant relief. If such a contention is to prevail, then indeed is the chancery court shorn of its power to protect persons in their right of property. If this doctrine is to be sanctioned, the person engaged in large enterprises may seize upon rights of less magnitude than his own, and, if an appeal is made to the law for protection, he may ignore the right of the injured and the pendency of the legal proceeding; and if he will put money enough into the new enterprise before a final decree is entered, so that it will cost him much more to restore the right he has wrongfully taken than a jury may regard the right as worth, he may prevent the entering of any decree whatever against himself, and may mulct the person who has appealed to the courts to protect his rights, in costs. This does not appeal to our sense of justice. The easement possessed by the complainant was created by deed. It imposed a servitude upon Mr. Edison's land for the benefit of the estate of complainant, which, under the statute of frauds, could not be assigned, granted, or surrendered, unless by a writing or by operation of law. Washb. Easem. (4th Ed.) p. 300. It was taken for granted by defendant May that he could not move this stairway without the permission of Mr. Edison, who was the owner in fee of one-half of it, but the title in fee was no more sacred than the easement held by the complainant, created by a deed for which payment had been made. It is difficult to avoid the conclusion that if the easement to which complainant is entitled can be taken without her consent simply because

defendant May will be benefited more than she will be damaged, for a like reason the title owned by Mr. Edison may be ignored. It is doubtless true that the parties ought to have been able to arrive at an amicable agreement, but in the absence of such an agreement the defendant had no more right to remove this stairway than he would have had to trespass upon any other portion of complainant's estate in such a way as to deprive her of its use, and then say to her that he had provided for her another estate just as valuable, and with which she should be satisfied. I know of no law which will justify such an invasion of the rights of property belonging to one person, to serve the convenience or necessities of another. It is the duty of the courts to protect persons in their right of property, even though the holdings may be small, instead of justifying a trespass, or compelling the owner of the property to accept something else in the place of it. Gregory v. Nelson, 41 Cal. 278; Ritchey v. Welsh, 149 Ind. 214, 48 N. E. Rep. 1031, 40 L. R. A. 105. In this case a definite agreement was made between the complainant and her grantors for the use of this easement in the place it was then located. It is for her to say whether the agreement shall be preserved in its integrity, and, before it can be changed, her consent must be obtained. Dickenson v. Canal Co., 15 Beav. 271; Hills v. Miller, 3 Paige, 253. In the case of Stock v. Jefferson Tp., 114 Mich. 357, 72 N. W. Rep. 132, 38 L. R. A. 355, the same argument was used that is urged by the solicitors for the defendant in this case. The court said: "It is the claim of the defendants that the loss to the complainant caused by the diversion of the water is trivial, while the damage the defendants would sustain if a permanent injunction is granted would be very great, and that therefore the injunction ought not to be allowed; citing Potter v. Railway Co., 83 Mich. 298, 47 N. W. Rep. 217, 10 L. R. A. 176, and cases there cited; Torrey v. Railroad Co., 18 N. J. Eq. 293, 10 Am. & Eng. Enc. Law, 799, and note; City of Logansport v. Uhl, 99 Ind. 539, 50 Am. Rep. 112. None of these authorities establishes the doctrine that, where one trespassed against acts promptly after notice of the trespass, equity will not interfere, where the trespass is of a continuing nature and is irreparable in its character. An examination of these cases will show either that it was doubtful if any damage would be done, or the complainant had not acted promptly in appealing to equity. It does not appeal to one's sense of justice to say that the exercise of a right possessed is not of as much benefit to the possessor as the taking of that right from the owner would be to the trespasser, and therefore the trespasser should be allowed to continue his trespass. The defendants knew the complainant was opposed to what they did. He forbade their acts, and when they continued them he caused a copy of a decree made more than forty years ago in favor of his grantors to be served upon them, and, when they paid no attention to all this, without unreasonable delay he appealed to the court. If they have expended considerable sums of money in committing this trespass, it is their own fault and they must lose it. It is urged very earnestly by counsel that Mr. Stock's right to maintain his dam and to use the water that would naturally come to his mill must give way to the right of the public to improve the highways, to drain lands, and to generally improve the country. It is sufficient reply to this argument to say that it has long been the fundamental law of the land that a man is not to be deprived of his property without due process of law and without compensation." Hall v. City of Ionia, 38 Mich. 493; Koopman v. Blodgett, 70 Mich. 610, 38 N. W. Rep. 649; Haslett v. Shepherd, 85 Mich. 165, 48 N. W. Rep. 533; Lathrop v. Elsner, 93 Mich. 599, 53 N. W. Rep. 791; Walz v. Walz, 101 Mich. 167, 59 N. W. Rep. 431; Manufacturing Co. v. Long, 111 Mich. 383, 69 N. W. Rep. 657; Hall v. Nester (Mich.), 80 N. W. Rep. 982; 1 High, Inj. § 804; Corning v. Nail Factory, 40 N. Y. 191; Jones, Easem. § 218; Gregory v. Nelson, 41 Cal. 278; Jaqui v. Johnson, 27 N. J. Eq. 526; Johnson v. Jaqui, *Id.* 552; Manning v. Railroad Co., 54 N. J. Eq. 46, 33 Atl. Rep. 802; Ritchey v. Welsh, 149 Ind. 214, 48 N. E. Rep. 1031, 40 L. R. A. 105; Washb. Easem. (4th Ed.) p. 300, 10 Am. & Eng. Enc. Law (2d Ed.), 429.

The circuit judge should have granted the injunction as prayed. It is doubtless true it will cost the defendant a good deal to restore to the complainant the easement as it existed when the suit was brought, but the defendant alone is to blame for the situation. All the work done in the removal of this stairway has been done since this proceeding was begun. The defendant preferred to act without waiting for the court to determine the controversy. In doing so he acted at his peril, and is justly chargeable with the consequences. He should be required to restore the easement as it existed when this bill was filed. A decree will be entered in accordance with this opinion, with costs of both courts.

NOTE.—*Right to Injunction to Restrain Interference with an Easement or to Compel its Restoration.*—Injunction, of all the extraordinary remedies administered by courts of equity, is probably the most satisfactory, because of its prompt action and complete relief. Improperly applied, however, no remedy is more disastrous. Another fact, profitable to remember, is that being an equitable remedy, equitable and not legal rules govern its application. The writ will therefore not issue when the result would be oppressive on the defendant, or where plaintiff, by reasons of his own acts, ought not, in good conscience, to ask it. Skrainka v. Oertel, 14 Mo. App. 474. Its application is addressed to the sound conscience of the court, acting upon all the circumstances in each particular case. It is purely discretionary, and not a matter of absolute right. For instance, where an injunction is sought in aid of an easement, or right of passage through a hall way on the third floor of two adjoining buildings, if it appeared that the uses of the hall has been perverted by permitting men and women of questionable character to pass through it at late hours of the night to the great detriment of the

defendant's property and the consequent diminished rental value, the court will not interfere, but will leave the party to his remedy at law. McBride v. Sayre, 86 Ala. 458. An injunction will therefore not be granted when it will operate inequitably or contrary to the real justice of the case. For instance, a fire broke out in defendant's mine, which threatened to destroy it and which made it necessary to flood the mine. Plaintiff's mine was separated from defendant's by a barrier pillar of coal, 50 feet thick, and he filed his bill to restrain defendant from further flooding, on the ground that this pillar would be destroyed if the pressure of water were increased. It was shown, however, that further flooding was the only way to extinguish the fire. Held that, as the injury to result from the act complained of is uncertain, while the injury which would result from granting the injunction was not only certain but of great magnitude, the injunction was properly refused. Lehigh Coal Co. v. Delaware Canal Co., 11 Pa. Co. Ct. Rep. 185 (1892). "In granting or withholding an injunction," says the court in McBride v. Sayre, *supra*, "the court weighs the conveniences and inconveniences in the first instance, and when very great injury will result to an unoffending party, by the stern fiat 'thou shalt' or 'thou shalt not' often leaves parties to their remedies at law."

Another fact must be taken in consideration. As between prohibitory and mandatory injunctions, the leaning and sympathy of the courts is altogether toward the former and away from the latter. Many things which the courts would not command to be done or to be undone, they will prohibit from being done. In fact, the courts are regarding with increasing favor proceedings which are preventive in their character, rather than compel the injured party to seek redress after the damage is accomplished. Western Union v. Light Co., 46 Mo. App. 120. Mr. High in his treatise on Injunctions, furnishes a succinct statement of this distinction which must be constantly applied in reconciling the cases on this subject. Speaking on the subject of trespass, which is not greatly to be distinguished from that of easement, he said: "Where the trespass complained of consists in the erection of buildings upon the complainant's land, a distinction is taken between the buildings when in an incomplete and when in a finished state. And while the jurisdiction is freely exercised before the completion of the structures, yet if they had been completed, the relief will generally be withheld, and the person aggrieved will be left to his remedy by ejectment."

Rights of easement are as sacred as any other rights in property. They are also rights which when obstructed or destroyed are not properly compensated by damages. Haight v. Littlefield, 21 N. Y. S. 1097. It may be that very little actual pecuniary loss will result from the obstruction or destruction of the easement, and that what is given in return seems as good to an outsider as what was taken away, yet the right to have other easement in a certain place and under certain conditions cannot be arbitrarily taken away. It is a well known rule that an easement cannot be changed without the consent of both the parties interested, even though the change would be beneficial. In such cases the court will grant the complainant injunctive relief. Haight v. Littlefield, 24 N. Y. S. 1097; Schwoever v. Boylston, 99 Mass. 298; Tillotson v. Smith, 32 N. H. 90; Wheeler v. Gilsey, 35 How. (N. Y.) Pr. 147; Appeal of North Manheim, 14 Atl. Rep. 137; Jacksonville v. Railroad, 67 Ill. 544. For instance, the occupant of a store may enjoin the occupant of an adjoining store from obstructing light and view and thereby exclude customers and injuring his business. Hallock v. Schuyler, 33 Hun (N. Y.), 111. The old English doctrine of ancient lights does not obtain in this country, so that where one expects to have the uninterrupted enjoyment of light and air, he must covenant to that effect. For instance, where both plaintiff and defendant derive title to adjacent premises from a common source, and defendant is about to erect a building upon his vacant premises which will have the effect of obstructing many of plaintiff's windows in a building constructed by the original grantor of both parties, equity will not interfere by injunction in the absence of any covenant in the grant under which the plaintiff claims, indicating an intention on the part of the grantor to limit the use of the vacant lot so that it shall not impair plaintiff's light and air. Shipman v. Beers, 2 Abb. N. Cas. (N. Y.) 435. The right to lateral and subjacent support is an incident of the ownership of land and its infringement will be enjoined. Where the defendant by mining operations upon his own premises adjacent to those of plaintiff, has endangered the walls and lateral support of plaintiff's house, he may be enjoined from working under plaintiff's land, or within his own boundary in such a manner as to occasion any subsidence or alteration of the surface of plaintiff's land. Hunt v. Reake, Johns. 705; Wier's Appeal, 74 Pa. St. 2130. An injunction will be granted in a proper case for the protection of an easment or servitude in water, and an easement in water, acquired by prescription, is as absolute as any other right, and equity will restrain its violation. Hulme v. Shreve, 3 Green (N. J.), Ch. 116; Natonia v. McCoy, 23 Cal. 490; Sheboygan v. Sheboygan, 21 Wis. 667. In a suit to restrain defendants from raising the level of the street in front of plaintiff's hotel, it appeared that they were about to raise it three feet above the level of plaintiff's property. Held, that this was an obstruction of plaintiff's reasonable use of the street, for which injunction would lie in the absence of anything to show that defendants were proceeding under legal authority. Schaufele v. Doyle, 86 Cal. 107. Such injunction may be mandatory as well as prohibitory. A grant of part of the grantor's land with all appurtenances, conveys the easement of a private sewer; and the grantor may be compelled, by mandatory injunctions to remove obstructions placed by him in the sewer on his own land. Fitzpatrick v. Mik, 24 Mo. App. 435. Where the defendent maliciously erected a structure on his own land for the purpose of shutting off the plaintiff's light and air, and there was a statute providing that an injunction might be issued to prevent the erection of such a structure, a mandatory writ prohibiting the continuance of the structure was granted. Harbison v. White, 8 Rep. (N. S.) 536. In Lakenan v. Railroad, 36 Mo. App. 363, the plaintiff had an easement in the nature of a right of way over a certain tract of land. A railroad purchasing the fee of said tract dug up and permanently obstructed this right of way. The court held that an injunction would be issued to restrain the wrongful closing of this right of way, although the act complained of had already been committed. The court said: "The defendants argue that the plaintiffs are not entitled to relief by injunction, because the act which they seek to enjoin has already been committed. The wrong committed by them is a continuing wrong and would not be righted by an action of ejectment nor properly

compensated by an action for damages. Besides, they are entitled to the enjoyment of this easement in kind, and the law does not oblige them to submit to a tortious expropriation of it by the defendants in exchange for such damages as a jury might see fit to give them."

The last consideration to be noticed and the one on which the defendant relies in the principal case, is the application of a rule already referred to, "would it be equitable?" This principle is stated in some reports as follows: "In the exercise of its discretion the court will examine into all the circumstances of the case, and if it is apparent that the relief sought is disportionate to the nature and extent of the injury sustained, or if the injunction will cost the defendant many times more loss than the complainant will suffer the court will not interfere." Hall v. Rood, 40 Mich. 46; Trustees v. Thacher, 87 N. Y. 311; Starkie v. Richmond, 155 Mass. 188; Bentley v. Root, 19 R. I. 205; Swift v. Jenks, 19 Fed. Rep. 641; Varney v. Pope, 60 Me. 192; McElroy v. Goble, 6 Ohio St. 187. All these cases after careful examination reveal a principle that is not at all out of harmony with the general rules just announced. Most of these cases asked for relief by mandatory injunction years after the defendant had been permitted to invest heavily in improvements that constituted the obstruction, while in a few it was doubtful whether the right in the easement was interefered with at all or whether any right to the easement ever existed in the plaintiff. We have already seen that while courts are quick to respond to a prayer for injunctive relief when it will act as a preventive, they have not given a very sympathetic ear to a petitioner who asks for an order commanding something to be done or to be undone, especially when the granting of the order would bear inequitably on the defendant without a corresponding advantage to the plaintiff, or where the latter has not shown the proper diligence in asserting his rights. A few cases will illustrate this distinction. In the case of Bentley v. Root, 119 R. I. 205, the issue related to the obstruction of a private right of way by the respondents, it appearing that the easterly end of the way was sometimes used for the temporary storage of goods, but not so as to interfere with its use by plaintiff, and that a part of their building encroached 3 feet on the right of way. This condition of things had been permitted to exist for many years when the plaintiff came in and asked for a mandatory injunction demanding the removal of all obstructions, which the court properly denied. Where a railroad company built a side track on plaintiff's land, with knowledge and without opposition on the part of the plaintiff, it was held that, years after, the plaintiff could not come in and oust the defendant by a mandatory injunction. She was properly left to her remedies at law. Boeckler v. Railroad, 10 Mo. App. 448. Where an injunction was asked to compel the defendant to destroy a dam erected by him, and which cut off the water for plaintiff's mill below him, the court denied the petition, being admittedly influenced by the fact that the plaintiff permitted defendant to build the dam and waited three years before making objection. Varney v. Pope, 60 Me. 192. The late case of Starkie v. Richmond, 155 Mass. 188, gives a clear idea of this distinction. In this case A owned a right of way as an easement. B in building a structure on his own land encroached materially on Mr. A's right of way. A did nothing or made no serious objection for ten years. The court held that the restoration of the right of way by a mandatory injunction commanding B to tear down so much of his structure as encroached on the right of way would be oppressive, and that A only had his right of action at law. The court also held that A was guilty of unreasonable delay in enforcing his rights and was not equitably entitled to an injunction. The court said: "It is not every case of a permanent obstruction in the use of an easement that entities the aggrieved party to a restoration of the former situation. Each case depends on its own circumstances. It is for the court, in the exercise of a sound discretion, to determine in such instances whether a mandatory injunction shall issue. It will not be issued when it appears that it will operate inequitably and oppressively, nor when it appears that there has been unreasonable delay by the party seeking it in the enforcement of his rights, nor where the injury complained of is not serious or substantial, and may be readily compensated in damages, while to restore things as they were before the acts complained of would subject the other party to great inconvenience and loss."

CORRESPONDENCE.

SPANISH LAND GRANTS AND PRIVATE LAND CLAIMS.

To the Editor of the Central Law Journal:

The motion in United States v. Peralta, 99 Fed. Rep. 618, was a motion to compel the execution of a decree of the District Court of the United States for the Northern District of California, in a private land case. The court had adjudged in 1855 the validity of the grant of Spain to Luis Peralta of the Rancho San Antonio by natural boundaries and livery of seisin. On appeal the decree was affirmed by the supreme court at December term, 1856, as to validity of the grant, and as to boundaries, except the location of the northern line. That court sent its mandate to the district court to conform its decree to the opinion and execute it. 19 How. 343. The decree was amended by a decree made by the district court in November, 1859, and it only remained for the United States surveyor under the act of 1851, to survey the exterior lines of the grant, and for the United States to issue a patent to the confirmees. The petition avers that the survey was made in 1895, pursuant to the act of 1851, and the further act of July 23, 1866, and patent demanded and refused. The effect of the decree of 1859 was to vest the title to the Rancho in its entirety in the original grantee, as of its date, and in his sons (confirmees), to whom it passed at his death in 1851, and from them to the intervenor. United States v. Valdez, October 30, 1889. The record shows that after so affirming the title in the confirmees as tenants in common, the district court attempted to partition the grant and allot to two of the claimants an interior portion of it. This attempted partition was a usurpation by the federal court of the jurisdiction of the State court, which had exclusive jurisdiction of judicial partition of lands and of controversies between citizens. The decree setting off this portion of the grant was *coram non judice* for those reasons, and for the reason that the only issue presented by the pleadings, and which could bind the parties, was as to the validity and extent of the grant; and that was the only federal question in the case. The exterior lines of the grant being established by the decree of 1859, the only duty of the court was to see that those lines were correctly run on the ground by a proper survey. Miller v

Dale, 92 U. S. 477, act of June 14, 1860. The decrees of June 5 and August 4, 1871, were decrees under this attempted partition, and respected the location of the line said to exist between the lands so allotted to two of the claimants, and another claimant. This was an interior, and not an exterior line of the grant. The land claimed is stated in the opinion to be 46,685 acres; the land surveyed as shown by the decrees of 1871, is 18,848 acres.

In order to sustain this survey, and the patent issued under it, as an answer to the motion of intervenor, it was necessary that the final decree of 1859 should be set aside, and the decree of 1871 substituted as the final decree in the case, and the district court did not hesitate to do so. At page 629 the learned court says: "I deem it unnecessary to discuss at any length the provisions of section 8 of the act of 1866, because if the decree of 1859 is not the final decree, that act has no application to the proceedings herein. If the court retained jurisdiction under the acts of 1851, 1860 and 1864, up to the time of the decree of 1871, and thereafter until the patent was issued, that fact disposes of the motion made by the petitioner. The act of 1866 is not, and could not be, applicable to this case, except upon the theory of the petitioner that the decree of 1859 is the final decree, and that no survey was made thereunder until 1895, whereas the record shows as averred in the pleading of the United States (demurrer to the petition) that the decree of 1859 was supplemented and modified upon application of parties interested in some of the lands embraced therein by the decree of 1871." At page 626 the court, speaking of the decree and survey of 1871, and patent issued in pursuance of it, says: "The final decree of this court was enforced and patents were issued in accordance therewith. The petitioner could not thereafter invoke the power of this court to annul its action, and to proceed under the decree of 1859, which had been changed by the decree of 1871." In effect, a grant of 46,685 acres is satisfied by a survey and patent of 18,848 acres. The learned judge asserted power in the district court to reverse, annul and set aside its own decree, entered many years previously; its decree entered in execution of a mandate of the supreme court, and to substitute another decree about another matter. The district court was a court of special and limited jurisdiction in these land cases, and the supreme court denied its power to reverse its own decrees. The Fossat Case, 2 Wall. 709. The learned judge cites DeGuyer v. Banning, 167 U. S. 736, and Chipley v. Farris. That was ejectment. The court held that it could not reform the patent in such an action, nor could plaintiff recover demanded premises under a deed that excluded them. And advised him that he should have had his decree executed before bringing suit. In Chipley v. Farris the survey and patent purported to be survey and patent of the grant as provided for in the act of 1851, and were held conclusive on collateral attack.

San Francisco. JAMES T. BOYD.

HUMORS OF THE LAW.

"Gentlemen of the jury" said an Irish barrister, "it will be for you to say whether this defendant shall be allowed to come into court with unblushing footsteps, with the cloak of hypocrisy in his mouth, and draw three bullocks out of my client's pocket with impunity."

"Remember, witness," sharply exclaimed the attorney for the defense, "you are on oath."

"There ain't no danger of my forgettin' it," replied the witness, sullenly. "I'm tellin' the truth for nothin' when I could have made fifteen shillings for lyin' for your side of the case, and you know it."

WEEKLY DIGEST

Of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of the Supreme, Circuit and District Courts of the United States, except those that are Published in Full or Commented upon in our Notes of Important Decisions and except those Opinions in which no Important Legal Principles are Discussed of Interest to the Profession at Large.

1. ANIMALS—Keeping Vicious Dog—Exemplary Damages.—A charge that one who knowingly keeps a vicious dog, and permits him to run at large with a reckless disregard of the rights of the public, is liable for exemplary damages to one injured by the animal, is proper.—TRIOLO v. FOSTER, Tex., 57 S. W. Rep. 698.

2. APPEAL—Supreme Court—Jurisdiction.—A suit to cancel a deed of trust on the ground that a note which it secured had been paid did not involve a question of title to real estate, and was, therefore, improperly transferred from the St. Louis court of appeals to the supreme court.—BONNER v. LISENBY, Mo., 57 S. W. Rep. 735.

3. APPEALABLE ORDER—Mandamus.—*Mandamus* will lie, in a proper case, to compel fixing the amount of the penalty of a *supersedeas* bond to be given on appeal from an order confirming the sale of real estate.—STATE v. FAWCETT, Neb., 83 N. W. Rep. 176.

4. ASSIGNMENTS—Creditors of Assignor.—Defendant's husband, having a contract with the city of Jackson to build a school house, made a valid assignment to defendant of all the moneys due and to become due to him under such contract. Held, that the right of the assignee to the moneys assigned is not in any way affected by the conduct of the assignor in incurring debts for materials and labor subsequent to the assignment.—PECK-HAMMOND CO. v. WILLIAMS, Miss., 27 South. Rep. 995.

5. ATTACHMENT—Affidavit—Replevin Bond.—An affidavit for attachment is void which states no grounds whatever for the issuance of the writ; and all proceedings based thereon, including the writ and the levy thereunder, and a replevy bond given by defendants, are absolutely void.—WOOD v. BAILEY, Miss., 27 South. Rep. 1001.

6. ATTORNEY — Disbarment — Criminal Offense.—Where alleged misconduct involves a criminal offense, the court will not disbar an attorney in advance of a conviction, unless the evidence against him is clear and convincing.—IN RE NOONAN, N. J., 46 Atl. Rep. 370.

7. BANK CHECKS—Assignment.—The fact that an indorsee of a check received the same five days after its delivery to the drawee did not make it overdue, and subject it to any defense that might exist between the original parties.—FEALEY v. BULL, N. Y., 57 N. E. Rep. 681.

8. BANKRUPTCY—Acts of Bankruptcy by Corporation.—Where the officers of a corporation, acting under authority of a resolution of the board of directors, and in pursuance of a vote taken at a meeting of the stockholders, though against the objection of a minority of the stockholders, make a general assignment of all its property to trustees for distribution among its creditors, it is an act of bankruptcy on which a petition in involuntary bankruptcy against the corporation may be maintained.—CLARK v. AMER. MFG. & ENAM. CO., U. S. C. C. of App., Fourth Circuit, 101 Fed. Rep. 962.

9. BANKRUPTCY — Appeals — Appealable Orders.—Where a mortgage creditor of a bankrupt proves his claim as a secured debt, including the amount stipulated to be paid as an attorney's fee in case of foreclosure, but the latter item is disallowed by the referee, a decision of the district court, on review of such ruling of the referee, reversing his action and ordering the allowance of the attorney's fee, is a "judgment allowing a debt or claim," within the meaning of Bankr. Act 1898, § 25, subd. 3, and is therefore appealable to the circuit court of appeals.—SMITH v. MORTGAGE & DEBENTURE CO., U. S. C. C. of App., Fifth Circuit, 101 Fed. Rep. 956.

10. BANKRUPTCY — Provable Debts—Corporations—Limit of Indebtedness.—The articles of association of a manufacturing corporation limited the amount of indebtedness which it might contract to one-half the amount of its paid-up capital stock. The assets of the company having greatly depreciated, the bookkeeper made an entry on the books charging the loss to the capital stock, but this was not recognized by the officers or stockholders as a reduction of the capital, no amendment of the articles of association was filed or recorded, and no stock was called in or surrendered. Thereafter a debt was contracted by the company, which amounted to more than half the sum of its available assets, but did not exceed half the amount of stock paid up and actually issued to stockholders and held by them. Held, that such debt was valid and provable against the estate of the corporation in bankruptcy.—CUNNINGHAM v. GERMAN INS. BANK, U. S. C. C. of App., Sixth Circuit, 101 Fed. Rep. 977.

11. BUILDING ASSOCIATIONS — Trust Deed—Usury.—Where defendant became a stockholder in a building association for the purpose of obtaining a loan, and, with his wife, executed a bond to it conditioned for the payment of certain monthly installments, premiums, and interests on such loan, the premiums on the advance must be considered as interest, and they, with the specified interest, having exceeded the statutory rate as the principal decreases by the payment of monthly installments, the contract was usurious.—INTERSTATE BLDG. & LOAN ASSN. v. GOFORTH, Tex., 57 S. W. Rep. 700.

12. CARRIERS—Negligence — Proximate Cause.—The negligence of a railway company in operating a train with the locomotive in its rear was the proximate cause of injuries sustained by a passenger, who was thrown against an object in the car when the train collided with a horse on the track, since the consequences of so running were not so unnatural or unusual that they could not have been foreseen.—CHICAGO, ETC. R. CO. v. GRIMM, Ind., 57 N. E. Rep. 640.

13. CARRIERS OF LIVE STOCK — Shipment of Cattle—Negligence.—A carrier is liable, both under the common law and under Code, § 3548, where, within the limits of a city, it injured cattle in a car by "kicking" the car against another standing on a switch.—ILLINOIS CENT. R. CO. v. KERL, Miss., 27 South. Rep. 993.

14. CARRIERS OF PASSENGERS—Negligence—Burden of Proof.—Plaintiff's husband was a passenger on one of defendant's trains, and was killed by reason of a derailment of the train. Held that, after plaintiff has shown these facts, the burden of proof is on defendant to show that such derailment resulted from inevitable accident, or some other cause against which no human foresight could provide.—MEADOR v. MISSOURI PAC. RY. CO., Kan., 61 Pac. Rep. 442.

15. CARRIERS OF PASSENGERS—Negligence — Burden of Proof.—In an action by a passenger against a common carrier to recover for personal injuries received while traveling in a conveyance of the latter, proof of the accident and plaintiff's injury casts the burden upon the carrier to free itself from the presumption of negligence. The gist of the action being the negligence of the defendant, the above rule is not applicable in such suit against a railway company where the evidence introduced by the plaintiff shows that the accident resulted from an act of God, unavoidable casualty, or from causes not connected with the construction, operation, or maintenance of the railway.—ST. LOUIS, ETC. R. CO. v. BURROWS, Kan., 61 Pac. Rep. 439.

16. CHARITIES—Public Hospital—Liability to Patients.—The fact that a public hospital, chartered as a charitable corporation, exacts or receives a pecuniary consideration from a patient, does not affect its character as a charitable institution, nor its rights or liabilities as such in relation to such patient.—POWERS v. MASSACHUSETTS HOMŒOPATHIC HOSPITAL, U. S. C. C., D. (Mass.), 101 Fed. Rep. 896.

17. CONTRACT—Building Contract.—A building contract provided that the owner and his architect might reject materials not in accordance with the specifications. The architect rejected certain flooring, and the contractor supplied new flooring, which the owner and architect approved. Held, that the contractor was not liable for the warping of such flooring, due to insufficient seasoning thereof, occurring after the building had been approved and paid for, where the contractor had no knowledge of such defect, and the architect might have easily discovered it by the application of a well-known test.—STANDARD STAMPING CO. v. HEMMINGHAUS, Mo., 57 S. W. Rep. 746.

18. CONTRACT—Joint Contract — Pleading.—In an action on contract against several persons, it must appear on the face of the declaration that each defendant is bound by the entire contract set forth; that the entire contract counted upon is a joint contract.—BOARD OF EDUCATION OF CITY OF NEWARK v. HOWARD, N. J., 46 Atl. Rep. 574.

19. CORPORATION—Charitable Corporation—Liability for Torts.—An association for the care of prisoners for compensation, which is managed by officers elected by itself, makes its own by-laws, and has the right to hold property, is not exempt from liability for its torts on the ground that it is a public corporation, though its objects are of a benevolent character, and it is required to make annual reports to the governor.—TREVETT v. PRISON ASSN. OF VIRGINIA, Va., 36 S. E. Rep. 373.

20. CORPORATIONS—Promoters—Secret Profits.—Promoters of a corporation, subsequent to the creation thereof, and while they were the sole stockholders, voted to issue its corporate stock to themselves in payment for services rendered in securing options on land, which they assigned to the corporation. The stock so issued equalled the estimated profits to be derived from such options. Thereafter the promoters invited the public to subscribe to the stock, without disclosing the facts as to such stock to the subscribers, or getting their consent to the payment of such remuneration. Held, they are guilty of a fraud, and the company can, without returning the lands acquired under the options, maintain an action for the recovery of such stock, or damages for the loss thereof.—HAYWARD v. LEESON, Mass., 57 N. E. Rep. 656.

21. CREDITORS' SUIT—Liability of City.—Since Rev. St 1889, § 5220, exempts municipal corporations from process of garnishment, a plaintiff who had obtained judgment, and had execution returned unsatisfied, could not maintain a creditors' bill against the defendant and a city, to subject to the judgment salary due from the city to defendant, where defendant was at 1 in the employ of the city, and had not absconded, so that judgment could not be obtained against him.—GEIST V. CITY OF ST. LOUIS, Mo., 57 S. W. Rep. 766.

22. CRIMINAL EVIDENCE — Homicide—Self-Defense.—Where accused struck deceased and knocked him down, and the issue was whether in falling he struck his head against a buggy, and thus received the fracture of his skull from which he died, or whether accused struck him with a slung shot or something on that order, evidence that accused had an iron wedge in his buggy 10 days before the difficulty originated was inadmissible.—IRELAND V. COMMONWEALTH, Ky., 57 S. W. Rep. 616.

23. CRIMINAL EVIDENCE—Homicide—Threats of Third Person.—Where, on a murder trial, the defense was that a person other than defendant had done the killing, testimony as to threats made by such person, though not admissible of themselves, yet, in connection with evidence that such other person was guilty, was admissible as showing his motive and disposition to commit the crime.—GREEN V. STATE, Ind., 57 N. E. Rep. 637.

24. CRIMINAL EVIDENCE—Res Gestæ—Accusing Declarations of Third Parties.—The remark, "Little Jack Kennedy (defendant) shot him, and there he goes," made by a bystander after the homicide, is not *res gestæ*, but mere hearsay, and as such inadmissible against defendant.—EX PARTE KENNEDY, Tex., 57 S. W. Rep. 648.

25. CRIMINAL LAW — Barn-Burning.—Evidence that accused, after giving bond, left the county and remained absent, and that his bond was forfeited for failure to appear, was admissible; this conduct being, at least to some extent, inconsistent with his innocence.—SAYLOR V. COMMONWEALTH, Ky., 57 S. W. Rep. 614.

26. CRIMINAL LAW—Burglary—Breaking and Entering.—Where breaking and entering a house by force were essential to a conviction for burglary, and defendant's evidence clearly showed that the door of the house was open, it was error to refuse a special charge to the jury to acquit if they believed the entry was made through an open door, or had reasonable doubt whether it was so made, though the general charge instructed to convict if they believed beyond a reasonable doubt that defendant broke and entered the house by force, without consent, since defendant was entitled to a distinct substantive charge presenting such defense.—DUKE V. STATE, Tex., 57 S. W. Rep. 652.

27. CRIMINAL LAW—Circumstantial Evidence—Burden of Proof.—In the trial of a criminal case, where the evidence depended upon for a conviction is circumstantial, every fact necessary to connect the defendant with the commission of the alleged crime must be established to the satisfaction of the jury beyond a reasonable doubt, but this does not impose upon the prosecution the burden of proving every collateral or corroborative fact or circumstance in the case beyond a reasonable doubt.—STATE V. KRUGER, Idaho, 61 Pac. Rep. 463.

28. CRIMINAL LAW—Forgery—Indictment.—An indictment alleging the uttering of a forged instrument signed by a partnership, but not setting out the individuals composing it, or that their names were unknown to the grand jury, was sufficient.—BROD V. STATE, Tex., 57 S. W. Rep. 671.

29. CRIMINAL LAW — Forgery — Indictment.—An indictment for uttering as true forged paper, purporting on its face to have been issued by an agent in the name of his principal, which sets out the instrument in *hæc verba*, need not aver the authority of the agent.—STATE V. FAY, Minn., 83 N. W. Rep. 159.

30. CRIMINAL LAW— Homicide — Intent.—Where defendant is charged as a principal to murder in the first degree, by reason of having been present and aided and encouraged another in the act of killing, the jury should be instructed that, to justify a conviction, defendant must have been present of his express malice aforethought, and of his express malice aforethought aided in the commission of the homicide; and instructions omiting the element of defendant's intent, and making his guilt depend on that of the one doing the killing are erroneous.—LESLIE V. STATE, Tex., 57 S. W. Rep. 659.

31. CRIMINAL LAW—Homicide—Self-Defense.—Where deceased called defendant a vile name, and threatened him, and defendant went off some 60 feet, got a gun and shot deceased, an instruction that provocation as a defense must arise at the time of killing, and must not be the result of a former provocation, was proper, since it did not limit the inquiry of the jury to the very moment of the shooting, but included all that occurred during the transaction leading up to the shooting.—COURTNEY V. STATE, Tex., 57 S. W. Rep. 654.

32. CRIMINAL LAW—Indictment—Cutting and Wounding.—An indictment accusing defendant of the crime of "cutting and wounding another with intent to kill" sufficiently names the offense though the words "maliciously" and "feloniously" are omitted from the name, it being charged, in stating the acts constituting the offense, that they were committed "willfully, maliciously, and feloniously."—TUBBS V. COMMONWEALTH, Ky., 57 S. W. Rep. 623.

33. CRIMINAL TRIAL—Murder—Remarks of Prosecuting Attorney.—The court need not, without objection, check the prosecuting attorney, where in argument he makes statements as to the law, and recites the facts of certain murder cases, and states that in them the supreme court had held the defendants therein guilty of murder.—ODEN V. STATE, Miss., 27 South. Rep. 992.

34. DEED—Cancellation—Pleading.—A suit in equity by grantors to cancel their deed for the grantee's breach of his promise to support them, and a suit at law by the grantee against one of the grantors to recover damages for excluding him from the premises in violation of the deed, cannot be consolidated under Rev. St. 1889, § 2189 (Rev. St. 1899, § 749), authorizing consolidation of suits founded on liquidated demands pending between the same parties. — ANDERSON V. GAINES, Mo., 57 S. W. Rep. 726.

35. DEEDS — Fee-Simple — Wills.—A testator gave a life estate in his real estate to his wife, remainder in fee-simple to his son, with a limitation over in case the son should die before his mother, or under the age of 21 years, or without lawful issue. Held, that the word "or" in the will should be read as meaning "and," and, the son having attained the age of 21 years, the limitation over is defeated, and he has a vested remainder.—SHREVE V. MACCRELLISH, N. J., 46 Atl. Rep. 581.

36 DOWER—Release—Separation.—Married Woman's Act, ch. 108 (Code, § 2284), declaring that a married woman may contract with reference to her separate estate, which shall consist of her property at the time of marriage, or afterwards acquired, the rents and profits thereof, rights of action, damages for wrong, and compensation for property taken for public use, does not authorize her to release to her husband her inchoate right of dower in his lands, since such right is not a property right, within such provision.—LAND V. SHIPP, Va., 36 S. E. Rep. 391.

37. EMINENT DOMAIN—Additional Servitude—Trolley Line.—The contention that the construction of an electric railway, known as a "trolley" longitudinally upon a country public road, imposes a servitude in addition to that charged upon the lands by the original taking for a public highway, entitling the owner of the fee to additional compensation to be first made, is an unsettled question in this State.—EHRET V. CAMDEN & T. RY. CO., N. J., 46 Atl. Rep. 578.

38. EMINENT DOMAIN—Compensation.—On an issue as to the value of vacant land taken by a railroad, where evidence had been admitted, without objection, of the purchase price at a recent sale of a lot with a building on it, across the street from the land in question, as bearing on the value of the land taken, it was error to admit the testimony of experts as to the value of the house, to give the jury an idea as to what the lot was worth without the building.—OLD COLONY R. Co. v. F. P. ROBINSON Co., Mass., 57 N. E. Rep. 670.

39. EMINENT DOMAIN—Damages.—Damages for lands appropriated for a highway accrue at the date of the condemnation proceedings, without regard to the time when the road is actually opened.—HARLAN COUNTY v. HOGGSETT, Neb., 83 N. W. Rep. 171.

40. ESTOPPEL—Statement in a Deposition.—A statement made in a deposition in a case between third parties is not absolutely binding upon the person making it, and if inadvertently made, andjnot willfully false, does not estop him from showing the facts in another action.—LEE v. CALVERT, Tenn., 57 S. W. Rep. 627.

41. EVIDENCE — Credibility of Witness—Proof of Prejudice.—The credibility of a witness for defendant cannot be attacked by proof that plaintiff's petition contains charges of malpractice against him as a physician, unless it is shown that the witness had knowledge of the allegations of the petition at the time his testimony was given.—HOUSTON, ETC. RY. Co. v. PATTERSON, Tex., 57 S. W. Rep. 675.

42. EXECUTION—Exemption—Seed Grain.—An owner of a farm may claim the exemption of seed grain, under the statute, when renting the farm on shares and furnishing the seed.—MATTESON v. MUNROE, Minn., 83 N. W. Rep. 153.

43. EXECUTION PURCHASER—Assignment of Judgment.—Where a judgment creditor, after causing notice of a sheriff's sale of land to be published for a portion of the statutory time, amended the same by adding a description of other real estate, but did not change the date of sale, the fact that sufficient notice had not been given as to the land last inserted in the notice did not affect the validity of the notice as to the balance of the land.—BRADLEY v. HEFFERNAN, Mo., 57 S. W. Rep. 763.

44. EXECUTORS AND ADMINISTRATORS—Claims Against Insolvent Estate.—A note given as collateral security for an indorsement on another note may be proved against the insolvent estate of the deceased maker, though the indorsed note was proved by the holder in full against such estate.—EMERSON v. PAINE, Mass., 57 N. E. Rep. 667.

45. FALSE IMPRISONMENT — Elements of Offense.—A count in a declaration alleging the issuance of a warrant by one defendant at the instance of another; the execution of such warrant by a third defendant, by the arrest and detention of plaintiff thereon; that such acts were done without authority of law, maliciously, and without reasonable and probable cause, and for the purpose of coercing plaintiff's action in a civil suit; but containing no allegation as to the termination of the prosecution,—states a good cause of action for false imprisonment, although not for malicious prosecution.—DAVIS v. JOHNSON, U. S. C. C. of App., Fourth Circuit, 101 Fed. Rep. 952.

46. FALSE IMPRISONMENT — Illegal Act of Mayor.—A mayor who causes one to be brought before him for an offense over which he has no jurisdiction, fines him, and causes him to be committed on the conviction, is liable for false imprisonment.—STATE v. MCDANIEL, Miss., 27 South. Rep. 994.

47. FEDERAL COURTS — Jurisdiction—Intervention.—In a suit in equity in a federal court by one who has established his title in an action at law to an undivided interest in a tract of land, brought in his own behalf alone to recover his share of the value of oil alleged to have been unlawfully taken from the land by defendant, where the only ground of federal jurisdiction is diversity of citizenship, tenants in common with complainant, who are citizens of the same State as defendant, are not entitled to intervene as complainants for the recovery of their shares of such profits made by defendant on the ground that there is a fund in court in which they are interested; nor are they given the right to intervene for such purpose by the fact that a receiver has been appointed, on application of the complainant, to take charge of and operate oil wells on the land pending the suit.—FOREST OIL CO. v. CRAWFORD, U. S. C. C. of App., Third Circuit, 101 Fed. Rep. 950.

48. FRAUDS, STATUTE OF—Agreement to Indemnify.—An agreement by A to indemnify B for becoming accommodation indorser for C is not within the statute of frauds, and therefore need not be in writing; and the assumption of the responsibility of an accommodation indorser on the faith of such agreement is a sufficient consideration to support it.—WARREN v. ABBETT, N. J., 46 Atl. Rep. 575.

49. FRAUDS, STATUTE OF—Memorandum in Writing.—A written offer to take a lease for certain premises and at certain payments, payable quarterly, and subsequently amended by telephone as to the time of making payments, which offer, as amended, was accepted, is within the statute of frauds, since there is no writing to support the contract as accepted.—WIESSNER v. AYER, Mass., 57 N. E. Rep. 672.

50. FRAUDULENT CONVEYANCES—Insolvent Debtor.—Where an insolvent debtor conveys lands to his niece for an insufficient consideration, and the deed is recorded, and the grantee takes possession thereunder, such facts constitute sufficient information to the grantor's creditors to put them on inquiry as to his intent to defraud them; and hence the statute of limitations begins to run against the creditors' action to set aside the conveyance from the date of the record of the deed.—VODRIE v. TYNAN, Tex., 57 S. W. Rep. 680.

51. GUARANTY — Construction.—Under a contract of guaranty unconditionally guarantying the payment of "of any indebtedness" from a debtor to a creditor named until further notice, not exceeding the sum of $1,500, and agreeing that "the form of such indebtedness may be changed from account to note," the guarantors are liable for any indebtedness, within the limit named, from such debtor to the creditor, whether it be represented by note or open account.—ROTAN GROCERY CO. v. MARTIN, Tex., 57 S. W. Rep. 706.

52. GUARDIAN—Commissions.—Where a guardian has wholly collected and disbursed moneys arising from personalty or rent of real estate, he has, as to such moneys, finally settled the estate, and should receive a guardian's whole commission, of 10 per cent.—MAXWELL v. HARKLEROAD, Miss., 27 South. Rep. 990.

53. HOMESTEAD — Liability for Debts—Sale.—Under Rev. St. 1880, § 5439, vesting the homestead in the widow and minor children, without being subject to debts of the deceased during the life of the widow and minority of the youngest child, and providing that all the interest of the deceased, except such homestead, shall be subject to payment of debts against the estate, land occupied as a homestead by a widow and minor children, cannot be sold by the administrator, subject to the homestead rights, for payment of debts of the deceased.—IN RE POWELL'S ESTATE, Mo., 57 S. W. Rep. 717.

54. HUSBAND AND WIFE — Fraudulent Conveyance.—A conveyance from husband to wife was properly held invalid as to the husband's creditors where there was neither allegation nor proof that the money which was paid for the land was the separate estate of the wife, the presumption being that it belonged to the husband.—RUGLESS v. ROBINSON, Ky., 57 S. W. Rep. 619.

55. INJUNCTION—Appeal.—An appeal from a decree in a proceeding for an injunction by a publisher to enjoin the use of books published by a rival concern, and to compel the use of his books, wherein the trial court decreed that the school board desist from using the in-

tervening respondent's books, and that it uses petitioner's books, stays not only so much of the decree as commands the use of petitioner's books, but also that portion which prohibits the use of respondent's books. Hence the board are not in contempt in refusing, pending the appeal, to desist from using the books of the intervening respondent, and a writ of prohibition will issue to prevent their punishment.—MARK v. SUPERIOR COURT OF CITY AND COUNTY OF SAN FRANCISCO, Cal., 61 Pac. Rep. 486.

56. INJUNCTION—Obstruction of Irrigation Ditch.—Injunction is the appropriate remedy to prevent a party from obstructing or unlawfully interfering with an irrigation ditch of which the owner is in actual possession.—PARK v. ACKERMAN, Neb., 83 N. W. Rep. 173.

57. INSOLVENCY—Usury — Action to Recover.—Any plea or suit for the recovery back of usury voluntarily paid by a debtor to his creditor must be brought within a period of one year after such payment is made. Hence, in a contest between two creditors over the assets of their insolvent debtor, one creditor cannot make the other account for usury voluntarily paid him by the debtor before insolvency, without instituting proceedings for this purpose within 12 months from the time of such payment.—GRAMLING v. POOL, Ga., 86 S. E. Rep. 430.

58. INSURANCE—Mutual Company — Assessment—By-Laws.—Where by-laws indorsed on a fire policy issued by a mutual company, and made a part of the contract, provide "that a full statement of losses assessed for will be sent with each assessment," a receiver of the company cannot collect an assessment directed to be levied by the court to pay losses, unless he sends a statement of such losses, with a notice of the assessment.—ANNAN v. HILL UNION BREWERY CO., N. J., 46 Atl. Rep. 563.

59. INTOXICATING LIQUORS—Local Option—Offenses.—A conviction on a count in an indictment for violation of the local option law in a certain precinct of the county is erroneous, where, since the adoption of local option in the precinct and before the finding of the indictment, it had been adopted in the county, since the law in the precinct was merged in that of the county.—RABY v. STATE, Tex., 57 S. W. Rep. 651.

60. INTOXICATING LIQUORS — Wrongful Sale—Evidence.—Where a bottle of cider is admitted in evidence in a prosecution for selling fermented liquor, it is not error to permit the members of the jury to taste the contents, where the evidence tends to show that the cider is in the same condition as when purchased.—PEOPLE v. KINNEY, Mich., 83 N. W. Rep. 147.

61. LANDLORD AND TENANT—Lease—Validity.—In an action for rent due under a lease of premises exclusively for a liquor saloon, the defense was that the premises were within 200 feet of a grammar school, within which limits a saloon could not lawfully be established, and that, therefore, the lease was illegal and void. Held, that since it does not appear that a license could not lawfully be obtained by transfer from premises within the limits which were licensed before the passage of the law, nor that plaintiff intended that the statute should be violated, the lease will be upheld.—SHEDLINSKY v. BUDWEISER BREW. CO., N. Y., 57 N. E. Rep. 620.

62. LIFE INSURANCE—Application.—An insurance policy issued by a company organized under the laws of Pennsylvania, which recites that the company has, by its officers, signed the contract at its office in Philadelphia, and promises to make payment after proof of death received at its office in Philadelphia, is a Pennsylvania contract governed by the laws of that State.—FIDELITY MUT. LIFE ASSN. OF PHILADELPHIA v. MCDANIEL, Ind., 57 N. E. Rep. 645.

63. LIFE INSURANCE — Application — Modification of Contract.—Where life insurance was issued on an application providing that no verbal statement should modify the contract or affect the rights of the insurer, unless written and approved by its officers, and that such application should be the sole basis of the contract, the validity of the insurance was not affected by oral communications of the insured to the agent who solicited the insurance.—FIDELITY MUT. LIFE ASSN. v. HARRIS, Tex., 57 S. W. Rep. 685.

64. MALICIOUS PROSECUTION—Liability of Partnership—A partnership is liable as such in a action for malicious prosecution, when the same was instituted in furtherance of the partnership's interests, and by direct authority of its members. — PAGE v. CITIZENS' BANKING CO., Ga., 36 S. E. Rep. 418.

65. MARRIAGE—Presumption.—The presumption of a lawful marriage from the fact that the parties have lived together and cohabited as husband and wife does not arise where the proof indicates that their relations were entirely meretricious from their inception.—MCBEAN v. MCBEAN, Oreg., 61 Pac. Rep. 418.

66. MASTER AND SERVANT—Injury to Employee—Negligence.—One employed as a laborer for all purposes connected with the construction of a tram-car track from a mill, who, being at work within 30 yards of the end of the track, while moving along beside a construction car, trying to brake it with a crowbar, was injured by the bar striking a post 4 feet high and 2 feet from the rail, cannot hold the employer for damages on the ground that the erection of the post on the preceding day for the purpose of a temporary cattle gap, without notifying him thereof, was negligence.—ROBINSON LAND & LUMBER CO. v. GAGE, Miss., 27 South. Rep. 998.

67. MASTER AND SERVANT—Negligence.—An employer is bound to exercise reasonable care in selecting and in retaining employees competent to carry on the work in which they are engaged; and proof that a coal mine company's "pit boss" who had charge of the operation of its mine, had ample time and opportunity to learn of the incompetency of a certain miner therein employed, tends to sustain the allegation that the defendant company had knowledge of the incompetency of such employee.—CHEROKEE & PITTSBURG COAL & MINING CO. v. DICKSON, Kan., 61 Pac. Rep. 450.

68. MASTER AND SERVANT—Negligence—Appliances.—A master's duty to furnish employees with safe appliances applies to cars received from other companies as well as its own.—EATON v. NEW YORK CENT. & H. R. R. CO., N. Y., 57 N. E. Rep. 609.

69. MASTER AND SERVANT — Negligence — Assuming Risk.—Where it appeared that plaintiff was injured by the breaking of a ladder while in the employ of defendant, and that the ladder had been previously broken and spliced, and several witnesses testified that a spliced ladder was only one-half to three-fourths as strong as originally, this was sufficient evidence to go to the jury on the question of defendant's negligence in furnishing such a ladder.—JONES v. PACIFIC MILLS, Mass., 57 N. E Rep. 668.

70. MASTER AND SERVANT—Negligence of Physician.—Where a railway company maintains a hospital for the care of injured employees, purely as a charitable institution, and receives no revenue therefrom, it is not liable for the negligence of a physician employed by it, unless there was a lack of proper care in selecting or retaining him.—GALVESTON, H. & S. A. RY. CO. v. HANWAY, Tex., 57 S. W. Rep. 696.

71. MASTER AND SERVANT—Rules—Customary Violation.—A rule of a railroad company against going between moving cars to uncouple them will not prevent recovery by a servant for injuries received while violating the same, if its violation was sanctioned by a custom so universal and notorious that the company was presumed to have known of and ratified it.—FLUHRER v. LAKE SHORE & M. S. RY. CO., Mich., 83 N. W. Rep. 149.

72. MECHANIC'S LIEN—Sufficiency of Statement Filed.—Under Code Va. § 2476, which requires a general contractor, in order to be entitled to a mechanic's lien, to file with the clerk "an account showing the amount and character of the work done or materials furnished,

the prices charged therefor, the payments made, if any, and the balance due," a statement merely claiming a lump sum for "labor performed and materials furnished" in the erection of certain buildings, "as per contract," is insufficient, and does not entitle the claimant to a lien, where the statement does not show that the work charged for was done as an entirety under a contract calling for the specific amount claimed. —WITHROW LUMBER CO. v. GLASGOW INV. CO., U. S. C. C. of App., Fourth Circuit, 101 Fed. Rep. 863.

73. MINING LEASE—Validity—Constitutional.—A lease of agricultural land for a term of 20 years for mining purposes, with a covenant precluding the lessee from doing any other business on the premises, and permitting land not needed for mining purposes to be used by the lessor for agricultural purposes without hindrance except as required by the mining operations, is not a violation of Const. 1848, art. 1, § 14, or Rev. Const. art. 1, § 18, prohibiting leases of agricultural land for a longer term than 12 years.—MASSACHUSETTS NAT. BANK v. SHINN, N. Y., 57 N. E. Rep. 611.

74. MONOPOLIES—Action for Damages under Anti-Trust Act.—An action under Anti-Trust Act (Act July 2, 1890; 26 Stat. 209) § 7, providing that "any person who shall be injured in his business or property by any other person or corporation by reason of anything forbidden or declared to be unlawful by this act may sue therefor in any circuit court of the United States, and shall recover three fold the damages by him sustained," is not an action for a penalty or forfeiture, within Rev. St. § 1047, prescribing a limitation of five years for a "suit or prosecution for any penalty or forfeiture, pecuniary or otherwise, accruing under the laws of the United States," but one for the enforcement of a civil remedy for a private injury, compensatory in its purpose and effect, the recovery permitted in excess of damages actually sustained being in the nature of exemplary damages, which does not change the nature of the action, and such action is governed as to limitation by the statutes of the State in which it is brought.—CITY OF ATLANTA v. CHATTANOOGA FOUNDRY & PIPE CO., U. S. C. C., E. D. (Tenn.), 101 Fed. Rep. 900.

75. MORTGAGES—Cancellation.—A borrower, on signing an obligation for a loan by a company, gave an order on it to pay the sum to the company's agent. The agent received the amount, and, without the borrower's direction applied the greater part to the satisfaction of a personal demand against a debtor who was a creditor of the borrower, and, on demand, refused payment to the borrower. Held, that as the company was not misled by the borrower's order to pay the amount to the agent, which it knew was the course of all loans passing through the agency, and was merely a device to shift to its customers the responsibility for misconduct of its agents, the deed of trust given as security for the loan was properly canceled.—TYSON v. FARM & HOME SAVINGS & LOAN ASSN., Mo., 57 S. W. Rep. 740.

76. MORTGAGE — Cancellation—Evidence.—The burden of proving that a mortgage executed by a wife was given as security for her husband's debt is on the wife, seeking to cancel the mortgage on that ground.—GAFFORD v. SPEAKER, Ala., 27 South. Rep. 1003.

77. MORTGAGE—Duress—Evidence.—It is not necessary, in order to sustain a plea of duress of fears excited by threats of arrest and prosecution for crime, and under the influence of which fears an instrument of writing was involuntarily executed, that the threats be directly made by the threatener to the one from whom the writing was extorted, or that they be communicated to him by an agent of the threatener authorized for that purpose. It is sufficient to sustain the plea if the threats be communicated by others, and that the natural and reasonable consequence of making them be so to excite the fears of the one who does the act as to overcome his judgment and will.—STATE BANK OF CHATHAM v. HUTCHISON, Kan., 61 Pac. Rep. 443.

78. MORTGAGES—Mechanic's Lien.—When one furnishes materials for the erection of a house, with actual knowledge of an outstanding unrecorded mortgage, his lien for materials is junior to the lien of the mortgage.—BRADFORD v. ANDERSON, Neb., 88 N. W. Rep. 175.

79. MORTGAGES—Trustee's Sale—Sale in Parcels.—At a trustee's sale under a deed of trust covering a platted addition, the trustee asked for bids on the separate lots and on the lots *en masse*, and then struck off the property to a bidder for the lots *en masse*, whose bid was more than the aggregate of the separate bids. Held that, the trustee having first announced the manner in which he would receive such bids, a bidder for a part of such lots could not compel an acceptance of his bid, as the trustee had a right to sell the property to the best advantage.—LAZARUS v. CAESAR, Mo., 57 S. W. Rep. 751.

80. MUNICIPAL CORPORATIONS.—Under Ky. St. (Ed. 1894, 1899), § 2884, part of charter of cities of the first-class, providing that a lien shall exist for the cost of construction of public ways and of digging and walling public cisterns, for the apportionment and interest thereon "against the respective lots," the territory which shall bear the cost of the construction of public ways being confined by *Id.* § 2833, the council has power by ordinance to define the territory, within reasonable limits, that shall bear the cost of construction of public fire cisterns; that body being authorized by *Id.* § 2783, "to pass, for the government of the city, any ordinance not in conflict with the constitution of the United States, the constitution of Kentucky and the statutes thereof."—LOUISVILLE STEAM FORGE CO. v. ANDERSON, Ky., 57 S. W. Rep. 617.

81. MUNICIPAL CORPORATIONS—Power of Board of Education.—Under Const. § 157, providing that "no county, city, town, taxing district, or other municipality, shall be authorized or permitted to become indebted in any manner or for any purpose, to an amount exceeding, in any year, the income and revenue provided for such year, without the assent of two-thirds of the voters thereof," the board of education of a city of the second-class, being a municipality, has no power to become indebted in excess of its income for the year in which the indebtedness is created. —BROWN v. BOARD OF EDUCATION OF CITY OF NEWPORT, Ky., 57 S. W. Rep. 612.

82. MUNICIPAL CORPORATIONS — Removal of Snow—Negligence.—Under an ordinance making it the duty of the street commissioner of a city to remove snow and ice that have remained on the sidewalks for six hours, the city is not chargeable with notice of accumulations of snow and ice on a sidewalk until six hours after the snow and ice have accumulated.—MCALLISTER v. CITY OF BRIDGEPORT, Conn., 46 Atl. Rep. 552.

83. NATIONAL BANK—Loan—Stock as Collateral Security.—Plaintiff sued the receiver of a national bank for money loaned the bank for which bank stock had been given as collateral security. The receiver defended on the theory that the transaction was a purchase of the stock. At the trial, plaintiff and another testified positively that plaintiff contracted for the loan with the bank cashier on the terms claimed by plaintiff. The receiver's evidence showed that after his appointment he furnished plaintiff, at her request, with a list of stockholders, in which her own name appeared, and that she did not disclaim being a stockholder, and did not begin suit for two years thereafter. Certain entries on the bank's books showed plaintiff to be a stockholder, but she had not receipted for the certificates she held on the bank's books, and it did not appear that she knew of the entries. In the letters to the comptroller and to defendant, written after the bank's insolvency, plaintiff, who was unexperienced in business matters, referred to herself as a stockholder. Held, that the evidence did not estop plaintiff from showing that she was not a stockholder,

and that that issue was properly submitted to the jury —AMER. NAT. BANK OF ARKANSAS CITY, KAN., v. WILLIAMS, U. S. C. C. of App., Eighth Circuit, 101 Fed. Rep. 943.

84. NEGLIGENCE—Infant — Imputed Negligence.—A jury should not be controlled in its action, except when the testimony will support no other verdict than that which is directed. The capacity of a child between 4 and 5 years of age to care for its own safety is a question for the jury, and not for the court. A child who, by reason of its mental capacity, is *non sui juris*, is not to be charged with the negligence of the person in whose custody it is.—MARKEY v. CONSOL. TRACTION CO., N. J., 46 Atl. Rep. 573.

85. PRINCIPAL AND AGENT — Authority—Notice.—One whose duties and authority as cashier is restricted to the payment of money under the direction of his employer is not the agent of his principal for the purpose of receiving notice of the assignment of wages by an employee.—STRAUCH v. MAY, Minn., 88 N. W. Rep. 156.

86. PRINCIPAL AND AGENT—Factor's Lien.—An agreement between plaintiff's assignor and defendants by which the former agreed to ship to defendants, for sale, the entire output of his canning operations during the season of 1895, does not make defendants joint owners with plaintiff's assignor of such output, but establishes between them merely the relation of principal and agent.—ELWELL v. COON, N. J., 46 Atl. Rep. 580.

87. PRINCIPAL AND SURETY—Treasurer's Bond—Term of Employment.—Where a banking institution at an annual meeting elected a treasurer "for the ensuing year," and such treasurer gave bond to faithfully administer his trust "during his continuance in office," the sureties on such bond were not liable for defaults made by such treasurer after the expiration of a year from his election.—ULSTER CO. SAV. INST. v. OSTRANDER, N. Y., 57 N. E. Rep. 627.

88. PROHIBITION—Judicial Officer — License to Sell Liquor.—Since a license to sell liquor is neither property nor a contract with the State, but a mere permit, subject to revocation, an excise commissioner authorized by Rev. St. 1899, § 3021, to revoke such licenses for violation of the liquor laws, is not, by reason of such power, a judicial officer, and hence a writ of prohibition will not lie against him.—HIGGINS v. TALTY, Mo., 57 S. W. Rep. 724.

89. PUBLIC LANDS—Pre-emption.—A private corporation in possession of a large ranch, the title of a portion of which was still in the government, to perfect title thereto employed a person to go on such government land in the guise of a settler under the homestead law, and, when title thereto had been secured to such employee, he should immediately convey it to the company, and in the meantime he should harvest the *alfalfa* thereon and feed it to the company's cattle, receiving a salary for his services. Held, that where such employee repudiated the trust, used the *alfalfa* for his own benefit, and asserted that the pre-emption was in his own behalf, a court of equity will grant no relief to such company, restraining such trespass or granting damages therefor, as such contract was contrary to public policy and the pre-emption law.—PACIFIC LIVE-STOCK CO. v. GENTRY, Oreg., 61 Pac. Rep. 422.

90. QUIETING TITLE—Pleading—Cause of Action.—Under Act March 15, 1897, authorizing actions to determine the interest of parties in land whether in possession or not, a petition to try title to real estate, alleging plaintiff's ownership of the land in fee, that it is wild land, not in actual possession of either party, and that defendants assert an adverse title therein of a nature unknown to the plaintiff, is sufficient, though it does not plead traversable facts.—HUFF v. LACLEDE LAND & IMPROVEMENT CO., Mo., 57 S. W. Rep. 715.

91. RAILROAD COMPANY — Crossings — Contributory Negligence.—Where a person approaching a railway track at a street crossing did not stop, look, or listen, and, in ignorance of the rapid approach of a train which would have been apparent to her had she done so, went on the track and was killed, she was guilty of contributory negligence, precluding recovery in an action counting on negligence of the railway company in failing to whistle and ring the bell, and in running at a greater speed than permitted by an ordinance, and so fast that the train could not be stopped before it reached the crossing.—CENTRAL OF GEORGIA RY. CO. v. FORSHEE, Ala., 27 South. Rep. 1006.

92. RAILROAD COMPANY—Death at Crossing—Contributory Negligence.—Plaintiff's intestate tried to cross defendant company's tracks in front of a train, whose approach could be seen several thousand feet. The engine had whistled a short interval before, the bells were ringing, and the gates were down. He was struck by the train and killed. Held, that he was guilty of contributory negligence, and plaintiff could not recover, notwithstanding the train was running at a higher rate of speed than permitted by a city ordinance.—PETERSON v. ST. LOUIS, ETC. RY. CO., Mo., 57 S. W. Rep. 709.

93. RAILROAD COMPANY — Excessive Speed—Proximate Cause.—Code 1892, § 3546, enacts that railroad companies may run their engines and cars through cities, towns, and villages at the rate of six miles an hour. One was injured, while walking along a path made by pedestrians parallel to a railroad track, by being struck by a rod projecting from one of defendant's freight cars, running at a greater speed than six miles an hour within a corporated town. Held that, to entitle plaintiff to recover for the injury because of the excessive speed, the speed must have been the proximate cause of the injury, and the plaintiff must have been free from contributory negligence, unless the injury was willfully, wantonly, or recklessly inflicted.—ALABAMA & V. RY. CO. v. CARTER, Miss., 27 South. Rep. 998.

94. RAILROAD COMPANY—Frightening Horses—Negligence.—Failure of the employees in charge of a locomotive to stop it or to give signals when approaching a crossing is not negligence, in case of a horse frightened thereby, but which was seen by such employees approaching the crossing too far off for a collision, and giving no indication of fright.—SOUTHERN RY. CO. v. COOPER, Va., 36 S. E. Rep. 388.

95. SALE—Conditional Sale—Record.—Where one delivers to another a certain amount of money with which, as his agent, to purchase live stock, and the purchase is accordingly made, the title to the stock vests in the principal; and if he agrees that the agent shall use the stock for a certain rental, and further agrees that the agent may, whenever he desires to do so, purchase the stock from the principal for the cost, with interest, this latter agreement is not a sale with reservation of title, and need not be recorded, under section 2776 of the Civil Code.—EVANS v. NAPIER, Ga., 36 S. E. Rep. 426.

96. SALE—Failure to Deliver Possession.—P, to secure a debt he owed a bank, executed to it a bill of sale of horses which were then in charge of a trainer under a contract which had not expired. In a short time the bank notified the trainer of its claim, and within 10 days P died insolvent. The executor took charge of the horses and sold them; agreeing to hold the proceeds subject to the bank's lien, if any. The bill of sale was not recorded. Held that, as it was impracticable to deliver the horses, the fact that possession did not accompany the bill of sale, as required by Ky. St. § 1908, did not invalidate the transfer, and therefore the bank has a prior lien on the proceeds of the horses. —BOURBON BANK v. PORTER'S EXR., Ky., 57 S. W. Rep. 609.

97. TAXATION—Exemption—School Buildings.—Buildings in which plaintiff conducted a school, and in which he resided with his family, are not used exclusively for school purposes and exempt from taxation. —CITY OF SAN ANTONIO v. SEELEY, Tex., 57 S. W. Rep. 688.

98. TAXATION — National Bank Stock—Assessment.—Under the statutes of this State, the tax levied on account of the shares of stock in national banks held by non-residents is not imposed upon the banks,—it is imposed upon the shares, being assessed in form only to the banks, which are required to pay the tax only out of dividends declared on the stock; and these statutes are in accord with the act of congress permitting the States to tax such shares.—MECHANICS' NAT. BANK OF TRENTON, V. BAKER, N. J., 46 Atl. Rep. 586.

99. TRUST — Devised Lands — Rents and Profits.—Where lands are devised charged with a trust for plaintiff's maintenance, and in a suit to enforce the trust the jury find a certain monthly allowance sufficient for his support, and it appears that the revenues of the lands are sufficient to pay this charge in addition to the cost of management, error assigned in excluding the devisee's evidence of the expense of providing a manager for the land is immaterial.—MCCREARY V. ROBINSON, Tex., 57 S. W. Rep. 682.

100. TRUST—Powers—Revocation.—Where much time and labor were expended, and valuable contingent rights were acquired in compensation for their services, by stockholders in a corporation, in reliance on a proxy and power of attorney given them by the majority stockholders, conditioned to be irrevocable for a certain term, and giving possession and control of the stock in trust to carry out the corporate purposes for their equal benefit, with power to sell or exchange the same, equity will not revoke such document during such term, in the absence of misconduct or breach of trust.—CHAPMAN V. BATES, N. J., 46 Atl. Rep. 591.

§ 101. TRUST—Voluntary Association — Specific Performance.—The alumni association of defendant seminary donated to it a sum of money to be used for the endowment of a professorship; the donation being on certain conditions. Subsequently the voluntary association became incorporated as the present plaintiff. Held, that plaintiff is the successor in rights and interests of the voluntary association, and as such can maintain an action for the enforcement of the trust created by the donation.—ASSOCIATE ALUMNI OF THE GENERAL THEOLOGICAL SEMINARY OF THE PROTESTANT EPISCOPAL CHURCH IN THE UNITED STATES OF AMERICA V. GENERAL THEOLOGICAL SEMINARY OF THE PROTESTANT EPISCOPAL CHURCH IN THE UNITED STATES, N. Y., 57 N. E. Rep. 626.

102. TRUST AND TRUSTEE—Removal.—A will directed that certain shares of stock be held by the executor in trust for the testator's children during their life, and then to go their children; the stock being a controlling interest in a company of which the testator was president. The executor became president of the company by his own vote, and had its by-laws amended giving him greater control. Previous to his election, he referred to the trust which had developed upon him. The testator's estate was free from debt. A few days after assuming the presidency he paid the first dividend to his *cestuis que trustent*. Held, that for any misconduct as president of the company the court has power to deal with him as trustee.—LISTER V. WEEKS, N. J., 46 Atl. Rep. 558.

103. VENDOR AND PURCHASER—Rescission—Fraud.—A bill to rescind a contract of sale of land for fraud, alleging a conveyance thereof by the grantee and his wife to their daughter, who is joined with them as a party plaintiff, and making tender of a deed, does not show a transfer of the land placing plaintiffs beyond equity jurisdiction, since the deed tendered is sufficient to revest all the title received.—CLINKENBEARD V. WEATHERMAN, Mo., 57 S. W. Rep. 757.

104. WILLS — Construction — Estate Conveyed.—The intention of a testator, if legal, governs the construction of his will, and is to be ascertained from the words thereof. If he uses words which clearly create one estate, though he designed another, his intention must yield to the rules of law.—HERTZ V. ABRAHAMS, Ga., 36 S. E. Rep. 409.

105. WILLS—Construction — Intent of Testator.—The rule which controls all others in the interpretation of wills is that the intention of the testator, to be gathered from the entire will, must govern.—RUTTER V. ANDERSON, W. Va., 36 S. E. Rep. 357.

106. WILLS — Construction — Limitation Over — Remainder.—Where, in a will probated in 1847, a life estate was bequeathed to testator's daughter, with remainder to her children, followed by an executory bequest to other legatees in the event she "should die without issue" the issue meant was such children, and not issue at large, and so the failure of issue contemplated was a definite, not an indefinite failure; and, the failure contemplated having happened—that is, the donee for life having died childless—the limitation over took effect.—CRAWFORD V. CLARK, Ga., 36 S. E. Rep. 404.

107. WILLS—Construction—Substitution.—A testator devised a share of his estate to his daughter C for life, and after her death to her heirs, with a direction that, in case she died without issue, then her share should be divided between his other two children, J and E, "or their heirs." Held, that the children of J and E on the death of their parents before C, who died without issue took her share *per stirpes* and not *per capita*.—BARTINE V. DAVIS, N. J., 46 Atl. Rep. 577.

108. WILLS—"Heirs."—A testator devises his real estate to his wife during her life, and adds, "At the death of my wife all the property to go to my daughter, Isabella Mathews Baer, for the benefit of her heirs." The daughter, surviving the life tenant takes the property in fee-simple under the will.—BAER V. FORBES, W. Va., 36 S. E. Rep. 364.

109. WILLS—Legacy—Election by Widow.—Where a testator provides a fund to furnish a certain income for his widow, designating the amount of the income, and providing that it shall be paid each year, and that securities shall be selected sufficient to secure that result, the selection of such securities in the first instance does not constitute a specific and changeless fund or legacy, the income of which must necessarily be diminished upon diminution of the producing capacity of such fund.—MERRIAM V. MERRIAM, Minn., 83 N. W. Rep. 162.

110. WILLS—Property Bequeathed—Bank Deposit.—A bequest of "all horses, harnesses, wagons, machinery, and all other personal property used in my butchering business, including all choses in action," does not pass a bank deposit, it appearing that the account was resorted to in connection with testator's general business; that accounts were paid out of it in no wise connected with his butchering business; that it was not at all necessary to the conduct of that business, which was an established and profitable one; that there were motives for opening the account growing out of a contemplated visit abroad; and that there were accounts due by customers to the butcher business satisfying the provision as to choses in action.—KOSS V. KASTELBERG, Va., 36 S. E. Rep. 377.

111. WITNESSES—Competency—Deceased Mortgagor.—Under Ann. Code, § 1738, providing that every person, whether a party or not, shall be competent to give evidence in any suit, and not incompetent because of any interest, in the result thereof; and section 1740, providing that a person shall not testify to his own claim or defense against the estate of a deceased person which originated during the lifetime of such deceased person—the testimony of the wife and daughter of a deceased mortgagor was admissible in a foreclosure suit, to show their interest by descent in the lands in question, since their claims did not originate in the lifetime of the mortgagor. — COVINGTON V. FRANK, Miss., 27 South. Rep. 1000.

112. WITNESS—Credibility.—The record of conviction of an offense below the grade of a felony is not admissible to affect the credibility of a witness.—YOUNG MEN'S CHRISTIAN ASSN. OF LINCOLN V. RAWLINGS, Neb., 83 N. W. Rep. 175.